SUBJECT INDEX.

	PAGE
PETITION FOR CERTIORARI	1
Opinion Below	3
Jurisdiction	3
Statement of the Case	6
Questions Presented	14
Statutes Involved	20
Specification of Errors	20
Reasons for Allowance of Writ	24
Conclusion	28
BRIEF OF ARGUMENT	29
BRIEF ON BEHALF OF PETITIONERS	39
A. It is the Duty of State Court to Enforce Rights under the Federal Constitution	40
B. This Court has Final Say where Claim is Based on Denial of Constitutional Rights	42
C. Petitioners were Denied Due Process, Equal Protection and Rights under Constitution and Laws of the United States by State Court Action	44
I. In Overruling Petitioners' Motion to Dismiss Without Prejudice	44
II. In Denying Interlocutory Appeal, Calling Special Term, Forming Trial in Face of Threats and under Armed Guards when Petitioners were Claiming Constitutional Rights, and Insisting on Their Right to Trial in Federal Court	49
III. In Proceeding to Judgment *Ex Parte* when Case was not Triable	56
IV. In Proceeding to Trial Including Cross-bill, when Practice Permitted No More than Dismissal with Prejudice	58

SUBJECT INDEX—(Continued)

PAGE

V. In Awarding Judgment on Cross-bill of Ridgeways 60

VI. In Proceeding on Cross-bill of Gulf when Demurrer was Pending without Hearing thereon, without Allowing Time for Answer, and when Petitioners had Compromised with Gulf 62

VII. In Awarding Judgment on a Controversy which had become Moot 71

VIII. In Awarding Judgment on Cross-bill showing no Right to Relief 74

IX. In Affirming on Appeal on Point not Presented by the Record, and as to which Petitioners had no Chance to Defend 87

X. In Affirming Judgments on Cross-bills and Extending Judgment to Other Litigants Not Parties or Privies thereto, and to Issues Not Involved, and Extending this Action to Bar Civil Actions in the Federal Court 95

CONCLUSION 105

CASES CITED.

PAGE

Adam v. Saenger, 303 U. S. 59, 82 L. Ed. 649 68
Adams v. Lucedale etc. Co., 113 Miss. 608, 74 So. 435 45
American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231 ..... 62, 71, 94
American Wood Paper Co. v. Heft, 8 Wall. 333, 19 L. Ed. 379 72
Ancient etc. Order v. Michaux, 279 U. S. 737, 73 L. Ed. 931 68
Angel v. Bullington (Feb. 17, 1947) L. Ed. Adv. Opinions, Mar. 10, 1947, p. 557 ..... 39, 43, 53, 90
Ayres v. Carver, 58 U. S. 591, 15 L. Ed. 179 78
Ayres v. Chicago, 101 U. S. 184, 25 L. Ed. 838 78
Baird v. Bardwell, et al, 60 Miss. 164 ..... 58, 59
Bass v. Borries, 116 Miss. 419, 77 So. 189 100
Belcher v. Wilkerson, 54 Miss. 677 ..... 78, 79
Bigelow v. Old Dominion etc. Co., 225 U. S. 111, 56 L. Ed. 1099 ..... 102, 105
Brinkerhoff etc. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107 ..... 62, 94
Broderick v. Rosner, 194 U. S. 629, 79 L. Ed. 1100 43
Brooklyn City etc. Co. v. National Bank, 102 U. S. 14, 26 L. Ed. 61 102
Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682 52
Buckingham v. Wesson, 54 Miss. 526 76
California v. San Pahlo etc. Co., 149 U. S. 308, 37 L. Ed. 747 73
California etc. Co. v. United States, 192 U. S. 355, 48 L. Ed. 476 84
Canadian etc. Co. v. Fitzpatrick, 71 Miss. 350, 14 So. 270 45
Carter v. Harvey, 7 So. 286 76
Chambers v. State, 309 U. S. 227, 84 L. Ed. 716 ... 44
Chantangco v. Abaroa, 218 U. S. 476, 54 L. Ed. 1116 102
Chase National Bank v. Norwalk, 291 U. S. 431, 78 L. Ed. 894 ..... 62, 70, 96, 104

CASES CITED—(Continued)

PAGE

Chicago etc. Co. v. Rambo, 298 U. S. 99, 80 L. Ed. 1066 ..... 44, 68
Chicago etc. Co. v. Union etc. Co., 109 U. S. 702, 27 L. Ed. 1081 45
C. I. O. v. McAdory, 325 U. S. 472 89 L. Ed. 1741 ... 73
Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 1027 93
Coleman v. Smith, 124 Miss. 604, 87 So. 7 100
Commonwealth v. Williams, 294 U. S. 176, 79 L. Ed. 841 56
Crescent City etc. Co. v. Butcher's Union, 130 U. S. 141, 30 L. Ed. 614 42
Dakota County v. Glidden, 113 U. S. 222, 28 L. Ed. 981 73
Davis v. Weschsler 90
Desollar v. Hanscome, 158 U. S. 606, 39 L. Ed. 956 .. 101
DeWeese v. DeWeese, 55 Miss. 315 ..... 79, 80
Domorest v. City Bank, 321 U. S. 36, 88 L. Ed. 526 43
Donald v. Philadelphia etc. Co., 241 U. S. 329, 60 L. Ed. 1027 55
Dorsey et al v. Sullivan, 24 So. (2d) 852 57
Dows v. The City of Chicago, 11 Wall. 108, 20 L. Ed. 65 84
Eastman v. Wyatt Lumber Co., 102 Miss. 313, 59 So. 93 86
Eustice v. Holmes, 52 Miss. 314 85
Fisher v. State, 145 Miss. 116, 110 So. 361 52
Georgia Railway etc. Co. v. City of Decatur, 295 U. S. 165, 79 L. Ed. 1365 94
Gilmer v. Felhour, 45 Miss. 627 ..... 78, 79
Hansberry v. Lee, 311 U. S. 32, 85 L. Ed. 22 ..... 96, 99
Harrison v. St. L. & S. F. Railroad Co., 232 U. S. 318, 58 L. Ed. 621 54

CASES CITED—(Continued)

	PAGE
Hayes, et al. v. First Joint Stock Land Bank, 174 Miss. 880, 165 L. Ed. 605	100
Hebert v. Louisiana, 272 U. S. 312, 71 L. Ed. 270	52
Helis v. Ward, 308 U. S. 365, 84 L. Ed. 327	94
Hinds et al v. Martin (C. C. A. 5) 286 Fed. 653	76
Holgate v. Eaton, 116 U. S. 33, 29 L. Ed. 538	84
Hooven etc. Co. v. Evatt, 324 U. S. 652, 89 L. Ed. 1252	68
Hovey v. Elliott, 167 U. S. 409, 418, 42 L. Ed. 215	67
International Harvester Co. v. Wisconsin, 322 U. S. 435, 88 L. Ed. 1373	68
Irving Trust Co. v. Day, 314 U. S. 556, 86 L. Ed. 920	43
Jacks v. Bridwell, 51 Miss. 881	79
Kapiolani Estate v. Atcherley, 238 U. S. 119, 59 L. Ed. 1229	103
Ladner v. Ogden, 31 Miss. 332	78, 79
Lamar Life Ins. Co. v. Billups, 175 Miss. 771, 169 So. 32	57
Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. Ed. 1102	68
Litchfield v. Goodnow, 123 U. S. 549, 31 L. Ed. 199	102
Longmeyer v. Mars, 124 Miss. 77, 86 So. 753	86
Lovell v. City of Griffin, 303 U. S. 444-453, 82 L. Ed. 949	43
Lyon Co. v. Ratliff, 129 Miss. 342, 92 So. 229	86
Majure v. Johnson et al, 192 Miss. 810, 7 So. (2d) 545	61
Malinsky v. People, 321 U. S. 401, 89 L. Ed. 1029	67
Markham v. Allen, 326 U. S. 490, 90 L. Ed. 256	56
McKnett v. St. Louis etc. Co., 292 U. S. 230, 78 L. Ed. 1227	42
Milkwagon Drivers etc. v. Meadowmoor Dairies, 312 U. S. 715, 85 L. Ed. 1145	43
Miller et al v. Ricky, 218 U. S. 258, 54 L. Ed. 1032	78
Mills v. Green, 159 U. S. 651, 40 L. Ed. 293	73
Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920	43

CASES CITED—(Continued)

PAGE

Missouri etc. Co. v. Larabee, 234 U. S. 459, 58 L. Ed. 1398 54
Mitchell et al v. Film Transit Co., 194 Miss. 550, 13 So. (2d) 154 ..... 50, 58, 59
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791 ..42, 62, 94
Moore v. Dempsey, 261 U. S. 86, 71 L. Ed. 543 52
Moore v. New York etc. Exchange, 270 U. S. 593, 70 L. Ed. 750 78
Myles Salt Co. v. Iberia etc. District, 239 U. S. 478, 60 L. Ed. 392 ..... 92, 105
National Milk Products Assn. v. San Francisco, 317 U. S. 423, 87 L. Ed. 375 73
New York etc. Co. v. Head, 234 U. S. 149, 58 L. Ed. 1259 55
Old Colony Trust Co. v. Omaha, 230 U. S. 100, 57 L. Ed. 1410 105
Paepcke Leicht Lbr. Co. v. Savage, 137 Miss. 11, 101 So. 709 57
Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 55
Pennsylvania General Gas Co. v. Pennsylvania, 294 U. S. 189, 79 L. Ed. 850 43
Providence etc. Co. v. Goodyear, 76 U. S. 807, 19 L. Ed. 587 78
Postal etc. v. Newport, 247 U. S. 464, 62 L. Ed. 1215 ..... 42, 96, 97, 105
Radford v. Myers, 231 U. S. 725, 58 L. Ed. 454 105
Radio Corporation of America v. Radio Engineering Laboratories, 293 U. S. 1, 79 L. Ed. 163 105
Radio Station v. Johnson, 326 U. S. 120, 89 L. Ed. 2092 43
Riley et al v. New York Trust Co., 315 U. S. 343, 86 L. Ed. 885 96
Robb v. Connolly, 111 U. S. 624, 28 L. Ed. 542 41
Rogers v. Peck, 199 U. S. 425, 50 L. Ed. 256 52
Roller v. Holly, 176 U. S. 520, 44 L. Ed. 520 94

CASES CITED—(Continued)

PAGE

Russell v. Denson, 98 Miss. 862, 54 So. 439 .....45, 48
Russell v. Federal Land Bank, 180 Miss. 55, 176 So. 737 100
Russell v. Hickory, 116 Miss. 46, 76 So. 825 86
Russell v. Place, 94 U. S. 606, 24 L. Ed. 214 101
Saunders v. Shaw, 244 U. S. 317, 61 L. Ed. 1163 91
Schuylkill etc. Co. v. Commonwealth of Penn., 296 U. S. 113, 80 L. Ed. 91 .....43, 68
Sigman v. Lundy, 66 Miss. 522, 6 So. 245 ....79, 82, 83, 84
Smith v. Denny, 90 Miss. 434, 43 So. 479 57
Smith v. O'Grady, 312 U. S. 329, 85 L. Ed. 861 41
Snyder v. Massachusetts, 291 U. S. 96, 78 L. Ed. 674 52
Southern Pacific Co. v. State, 325 U. S. 761, 89 L. Ed. 1915 68
South Spring etc. Co. v. Amador etc. Co., 145 U. S. 300, 36 L. Ed. 712 73
State v. Hemmingway, 69 Miss. 491, 10 So. 575 45
State of Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920 106
Steele v. L. & N. R. R. Co., 323 U. S. 192, 89 L. Ed. 173 43
Terrell v. Burke, etc. Co., 257 U. S. 529, 66 L. Ed. 352 55
Thomason v. Neely, 50 Miss. 310 .....78, 79
Thomas v. Worcester, 114 U. S. 104, 29 L. Ed. 105 67
Titus v. Wallick, 306 U. S. 282, 83 L. Ed. 653 .....42, 67
Toucy v. New York etc. Co., 314 U. S. 118, 86 L. Ed. 100 43
True-Hixon Lbr. Co. v. Thorne, 171 Miss. 783, 158 So. 909 101
United Gas etc. Co. v. State of Texas, 303 U. S. 123, 82 L. Ed. 702 .....44, 68
United States v. Bank of New York and Tr. Co., 296 U. S. 463, 80 L. Ed. 331 .....41, 55
Van Zandt v. Town of Braxton, 149 Miss. 461, 115 So. 557 99

CASES CITED—(Continued)

	PAGE
Vaughan v. Hudson, 59 Miss. 421	76
Watkins v. State Board, 170 Miss. 26, 154 So. 277	99
Williams v. State of North Carolina, 325 U. S. 226, 89 L. Ed. 1577	68
Wood v. Davis, 7 Cranch 271, 3 L. Ed. 339	105
Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220	105

AUTHORITIES CITED.

19 American Jurisprudence, Equity, Section 318, page 227	64
30 Corpus Juris, 788	77
34 Corpus Juris 1014	103
50 Corpus Juris Secundum 293	102
Griffith's Mississippi Chancery Practice—	
Sections 534	46
Sections 263, 556	57
Sections 538, 562	59
Section 379	76
Mississippi Code of 1942—	
Sections 1538, 1539	46
Section 1148	49
Sections 1314, 1323	56
Section 1296	61, 63
Section 1286	65
Section 1289	63
Section 1240	65
Section 1241	65
Section 1244	65
Sections 1297, 1298	66, 67
Section 1310	66
Section 1325	85
Section 1957	49

IN THE
SUPREME COURT OF THE UNITED STATES

No. .....

N. L. HUDSON, ET AL.,
Petitioners,

versus

GULF REFINING COMPANY, ET AL.,
Respondents.

PETITION FOR CERTIORARI.

Come now N. L. Hudson, Mrs. Exie Hudson, Phillip L. Hudson, Mrs. Mary Lee Tilghman, Mrs. Lessie Hudson Smith, Charles A. Hudson, Mrs. Mai Hudson Thompson, E. S. Blackman, Graydon M. Blackman, Mrs. Mae Hudson, Mrs. Ruby Mae Mitchell, Mrs .Grace Hudson Hyde, and Mrs. Gertrude Hudson Ellison, Petitioners herein, and pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Mississippi in the case of N. L. Hudson, et al vs. Gulf Refining Company, et al, No. 36406 on the docket of said court.

The appeal was from a decree rendered in a suit of a local nature to quiet and confirm the title of Petitioners

to land located in the First Judicial District of Jasper County, Mississippi. Respondents are three classes of claimants to the land or interests therein.

Claimants of the fee title who are Respondents herein are Talmadge D. Lewis and Annie Lewis, his wife, and other members of his family; Mason Newell and other members of the Newell family; Jettie Kelly Windham and George Windham; P. R. Bethea and Emma Bethea; Carrie K. Husband, Norman Husband, her husband and members of their family; Mrs. Florence B. Abney, Mamie M. Abney and members of their families; Cora B. Bradford and Clifton Meyers, together with such of the parties in the Court below as claim title to the surface through conveyances by any of them.

Claimants of an operating leasehold and mineral interests for the exploration for and development and production of petroleum deposits, who are Respondents herein, are the Gulf Refining Company and the Tidewater Associated Oil Company.

Other Respondents are Claudies and Paul Ellis Newell, George D. Leiderman, Rufus William Lewis, Thomas Melvin Lewis, S. J. Hooper, John F. Riddell, Jr., P. C. Morrison, Joseph M. Perkins, C. R. Ridgeway, and various others, all claimants to an interest in the oil and gas in place, or to royalties on the production thereof, and coming within the class or classes represented by them.

OPINION BELOW.

The opinion of the Supreme Court of Mississippi in said case, 30 So. 2d 66 (see also 30 So. 2d 421) and is printed in the Appendix to this Petition, p. 82 et seq.

JURISDICTION.

Jurisdiction of this court is invoked under the provisions of Judicial Code, Section 237 (28 U. S. C. A. 344 (b)). The opinion of the Supreme Court of Mississippi was rendered on the 21st day of April, 1947, and after suggestion of error had been overruled on May 19, 1947, judgment was entered thereon and became final on the 2nd day of June, 1947.

Petitioners come here within the time permitted, contending that they have been denied due process and equal protection of the laws in violation of Article Fourteen of the Amendments to the Constitution of the United States, and that they have been deprived of their rights as citizens of the United States and residents of states other than the State of Mississippi to have their controversy with Respondents adjudicated by the Courts of the United States under the provisions of Article III, Section II, paragraph 1 of the Constitution of the United States, and Section 24(1) of the Judicial Code of the United States (28 U. S. C. 41(1)).

Petitioners contend that they have been denied due process and equal protection by the Courts of Mississippi in the following respects:

They were denied their right to dismiss their suit in the State Court, contrary to the settled rules of State practice.

They were called upon by the State Courts to go to trial in the face of threats and intimidation, under the limited protection of armed guards to be stationed in the courtroom, or to suffer the dismissal of their suit with prejudice to their actions then pending in the Federal Court; and were denied an interlocutory appeal to determine their right to dismiss without prejudice

On the filing of their written protest and objections, and their withdrawal of their appearances in the State Court, said Court, instead of entering decree dismissing their suit with prejudice, which decree would have been final and appealable, entered upon a "trial on the merits" in the absence of Petitioners, putting on proof instead of taking the pleadings as confessed, taking up a cross-bill against Petitioners as to which Petitioners had settled with cross complainants, and which was not triable, and entering a final decree on all issues whether joined or triable, or not.

On Petitioners' appeal to the Supreme Court from the decree of the Trial Court, notwithstanding the appeal was from the trial on the bill and answer, following which the cross-bills were disposed of as having been rendered moot by the trial of the original issues; the Supreme Court considered this situation as being reversed, and dealt with the appeal as if it had been

taken from the failure of the Trial Court to dismiss the cross-bills, although this had not been assigned as error, and no argument had been had thereon, and affirmed the decree of the Lower Court on the theory that the trial was proper on two cross-bills, neither of which was triable according to State practice, one of which had been settled and compromised, and the other of which was not denominated a cross-bill, had not been served as such as required by statute, and had not been dealt with at all by the Trial Court. Petitioners made timely protest to the Supreme Court of Mississippi by Suggestion of Error (substituted for Petition for Rehearing under Mississippi practice) and their protests were overruled.

Petitioners contend that they have been denied their federal rights other than due process and equal protection, by the unseemly rush of the State Courts to adjudicate Petitioners' claims after Petitioners had withdrawn from the State jurisdiction, the violation of settled rules of State practice to reach an adjudication, and the effort to make the action of the State Court binding on the Federal Court, so that under the settled practice and rules of decisions of the latter Courts, Petitioners would be denied a hearing on the merits of their civil actions because of the prior adjudication of their claims by the State Courts.

STATEMENT OF CASE.

Petitioners, the heirs of N. L. Hudson, Sr., deceased, brought suit in the Chancery Court of the First District of Jasper County, Mississippi, to quiet title to three hundred sixty acres of land formerly constituting their homestead. The Defendants (Respondents herein) were five families claiming the fee, Gulf Refining Company claiming an oil and gas lease on three hundred twenty acres and Tidewater Associated Oil Company claiming a similar lease on forty acres and nearly one hundred claimants of royalty interests through said fee claimants. (R. 1-79.)

Practically all of the Respondents filed their answers and Gulf Refining Company filed a cross-bill about a half page long (R. 300, App. 24)[1] in which Gulf sought to do the reverse of what Petitioners were seeking by their bill to do—Gulf sought to confirm the leases which Petitioners were seeking to cancel. Petitioners waived service of the cross-bill and filed a general demurrer thereto (R. 398-9, App. 24-7) setting up that the cross-bill was nothing but a defense to the original bill and sought no relief except such as could be granted under the answer of Gulf. Certain royalty claimants known as the "Ridgeway Group" filed a like cross-bill (R. 452, App. 28-30) but this cross-bill was never served and was not referred to in the decree of the Chancery Court.

Pleadings were filed (R. 119, 202, App. 156) by certain Respondents in which the court was advised that Re-

[1] Petitioners have printed an Appendix in which such portions of the record are set forth as are considered necessary to consideration of the questions raised by this Petition. The record is very voluminous and it is suggested that statements of fact be subject, in every instance, to the test of reference to the record.

spondents Claudies Newell and Paul Ellis Newell, minors, had not been legally served with process and were absent from the United States as members of the armed services, and praying that proceedings be stayed until the end of their military service under the Soldiers and Sailors Civil Relief Act of 1940.

On December 15, 1944, Petitioners settled their suit with Gulf Refining Company by executing an oil and gas lease covering the same lands and containing substantially the same terms as the leases Gulf had from the other fee claimants. (R. 755, App. 42.) On December 11, 1945, Petitioners, being non-residents of Mississippi, filed four Civil Actions on the same cause of action in the United States District Court for the Eastern Division of the Southern District of Mississippi against most of Respondents (R. 795, 807, 821, 837) and immediately filed their motion to dismiss their State Court suit without prejudice (R. 605, App. 30).

Practically all of the Respondents except Gulf Refining Company filed written objections to the dismissal (R. 606, 640, 661, 678, 695, 713, App. 30, 38) based on the allegations that Petitioners had unreasonably delayed the progress of the Chancery Court action and had obtained an unconscionable advantage by addressing interrogatories to certain parties; that Petitioners had given a lease to Gulf Refining Company under the terms of which the Chancery Court of Jasper County was constituted the sole forum for the trial of the issues involved in the suit; and that Gulf was holding up the payment of oil royalties to the fee and royalty claimants because of the pendency of the suit.

Respondent, Gulf Refining Company, did not file any answer to the Motion to Dismiss and did not offer any objection to the dismissal and, although its attorneys were present in court when the motion came on for hearing (R. 753-4) they did not offer any evidence or call up their cross-bill or participate in the hearing or offer any objection to the granting of the Motion to Dismiss.

At the hearing on the Motion to Dismiss (R. 755-850, App. 41-62) Respondents other than Gulf introduced evidence in an effort to sustain the position taken in their said answers, and Petitioners introduced copies of the complaints they had filed in the United States District Court. The Chancery Court entered an order overruling the Motion to Dismiss without prejudice (R. 721), and Petitioners filed their application for an interlocutory appeal as provided by Mississippi practice and the chancellor refused to allow the appeal (R. 722-3) whereupon they applied to a judge of the Supreme Court of Mississippi (R. 1326) and such appeal was also denied by that court.

Notwithstanding the refusal of the Chancery Court to permit them to dismiss their suit or to appeal to settle the principles of the case, Petitioners proceeded with diligence to prosecute their Federal actions. All of the Respondents, Defendants in those actions, had filed motions to dismiss and pleas in abatement and, after extended hearings, the Federal Court had overruled said motions and pleas (R. 726, 734, App. 67); Petitioners had also defeated efforts to prevent the taking of depositions and had, in the Federal Court, taken their depositions and Respondents had also taken depositions and had addressed

more than four hundred pages of interrogatories to Petitioners (R. 727, App. 68); and the Federal Court actions had been brought to the point where they were ready for trial on the merits (R. 726 et seq., App. 69) and a trial on the merits was to be had promptly.

The issues in the Federal Court actions had been expanded beyond those of the State Court case, to include the reformation of the lease the Petitioners had given Gulf (R. 726, App. 67).

On March 15, 1946, the Federal Court entered its order (R. 734) overruling all of the Motions to Dismiss and Abate filed by Respondents in those actions thus clearing the way for trial on their merits and eleven days later the judge of the Chancery Court addressed a letter to all of the solicitors for the parties advising that he was calling a special term of the Chancery Court of Jasper County at which this case would be triable (R. 730, App. 63). The body of this letter is quoted here:

"In Re: N. L. Hudson, et al.,
vs. #398.
Gulf Refining Company, et al.
First District, Jasper County.

"Gentlemen:

"I have called a special term of the Chancery Court of the First District of Jasper County beginning the first Monday in May. The above case will be triable at that term.

"It has come to my knowledge that certain parties interested in the case have made threats against certain litigants, witnesses and attorneys. Of course, I

have no personal knowledge that any such threats have been made. But it is my duty, as I see it, to see that all officers of the court, litigants and witnesses are protected.

"Section 4240 of the Code of 1942 requires the Sheriff to attend all sessions of the court 'with a sufficient number of deputies or bailiffs'. I am directing the Sheriff to appoint 12 deputies from the western part of Jasper County, men of character and courage, to attend the special term of court, and it is my purpose to require the Sheriff and his deputies to search every person who comes into the court room. I want every one who is connected with this case to understand that it is my purpose to see that they are protected while attending court.

"I am writing you confidentially for the reason that I do not care that any notice be given of this action to the public.

"If you have any suggestions to make I will be glad to hear from you."

Petitioners, appearing specially, filed their written objection to any further hearing or step in the Chancery suit (R. 724-749, App. 64) claiming that their motion to dismiss without prejudice had divested the court of jurisdiction and exhibiting copies of their complaints and amendments in the Federal actions, and advising that the Federal Court had assumed jurisdiction and overruled Motions to Dismiss and that the Federal actions were at issue and ready for prompt trial (R. 726 et seq., App. 67 et seq.) and pleading with the Chancery Court not to force them to trial under the conditions set forth in the chancellor's letter but to permit them to proceed to trial in their

Federal actions where they were (R. 728, App. 69) "free of any atmosphere of threats, intimidation, or oppression, and under such circumstances that the witnesses and all who engage in the trial may perform their respective parts without fear of violence and without intimidation or oppression". In their written objection Petitioners stressed their reliance on their Constitutional right to proceed with their Federal Court actions and their contention that the Chancery Court would deny them due process of law and the equal protection of the laws under the Constitution of the United States if it should proceed with the hearing under the circumstances there set forth.

Respondents (R. 856-9, App. 72-5) took the position that the Chancery Court had exclusive jurisdiction and that the United States District Court did not have any jurisdiction to proceed with the cases and the chancellor, accepting that view, announced that he would proceed with the trial of the case.

Under Mississippi practice, Petitioners would waive the error of the Chancery Court in denying them the right to dismiss if they participated in the subsequent hearing and, to avoid such a waiver and the threats and trial under armed guards, Petitioners stood on their Federal Rights pressed before the court and withdrew and declined to proceed further in the Chancery case. The various Respondents proceeded to a "hearing on the merits" and introduced evidence covering three hundred eighty-two pages (R. 859-1241). The taking of testimony had been begun at one thirty p. m. May 6th and was entirely completed and the decree prepared and signed on that day

(R. 859, 749A-749C) although the decree was not filed until May 7th. On the same day, the special term of Court was adjourned (R. 1246).

The final decree (R. 749 A-C, App. 76) does the following things in the order named: finds that the complainants (Petitioners) are not entitled to any relief and dismisses the original bill and all amendments thereto with prejudice, overrules the demurrer of the complainants (Petitioners) to the cross-bill of Gulf, adjudges that Gulf is entitled to the relief prayed for in its cross-bill including confirmation of its leases from Respondent fee-claimants and cancelling the claims of Petitioners to the "lands covered by said leases" and adjudges that Gulf does not owe Petitioners any royalties.

No separate or preliminary hearing was had on Petitioners' demurrer to Gulf's cross-bill and no separate decree was rendered on it and no notice was given Petitioners that the cross-bill was overruled and no opportunity was given them by the decree or otherwise to file an answer to the cross-bill. Gulf did not amend its cross-bill to show that it had settled with Petitioners by accepting an oil and gas lease from them.

Petitioners appealed to the Supreme Court of Mississippi and in their assignment of errors set forth their reliance on their Constitutional rights theretofore raised by them (R. 1249, App. 79). The Supreme Court of Mississippi entered its order affirming the decree of the lower court (R. 1251), and filed its written opinion on which its judgment was based (R. 1252, App. 82). The

affirmance of the decree of the lower court was based entirely upon the cross-bill of Gulf and the cross-bill of the Ridgeway group, it being held that the decision on these cross-bills was *res judicata* of all of the issues between all of the parties, thus making moot the question of whether Petitioners had the right to dismiss without prejudice (R. 1257, App. 87).

In their suggestion of error (equivalent to Petition for Rehearing), Petitioners challenged the decision and opinion of the Supreme Court of Mississippi and reaffirmed their contention that the actions of the lower court affirmed by the Supreme Court took their property without due process of law, and denied other rights steadfastly claimed by them throughout the proceeding under the Constitution of the United States (R. 1301, 1314-1318). They further set up the claim that the Supreme Court disposed of the case on a question not raised in or decided by the court below or argued in the Supreme Court (R. 1317) and reiterated their reliance on their Constitutional Rights as claimed by them through the proceedings. The Supreme Court of Mississippi promptly overruled their suggestion of error (R. 1331). Later that court overruled their motion to correct the judgment and the judgment of the Supreme Court of Mississippi became final on June 2, 1947 (R. 1332).

From these judgments and decisions Petitioners seek relief from this court by grace of Certiorari, based on the claim that the action of the trial court in refusing to grant them their absolute right to dismiss in order that they might proceed to judgment in their Federal actions and in proceeding to judgment on the cross-bills in direct

disobedience to the Mississippi rules of practice without giving them opportunity to plead to or defend said cross-bills; and the action of the Supreme Court of Mississippi, in deciding the case on questions not presented to the trial court or argued before it and in holding the judgment between Petitioners and Gulf to be *res judicata* as to the issues not involved in, and as to litigants not parties to, the cross-bills, took their property without due process of law and denied to them the equal protection of the laws.

Since the moment they filed their Motion to Dismiss without prejudice, Petitioners have placed their sole reliance on the Constitutional Rights they asserted at every stage of the State Court proceeding. Neither the trial court nor the Supreme Court of Mississippi noticed or referred to the Federal questions raised and apparently neither court gave these Federal questions any consideration whatever.

QUESTIONS PRESENTED.

I.

Under the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States:

A. Did the action of the trial court in requiring Petitioners, being non-residents of Mississippi, to proceed with the trial in the presence of armed guards and under the

circumstances prevailing, or suffer the dismissal of their suit with prejudice, amount to a denial of rights claimed by Petitioners under those clauses?

B. Was the denial of Petitioners' motion to dismiss without prejudice, and the subsequent dismissal of their suit with prejudice, where they had withdrawn their voluntary appearance and had not been served with process on any complaint against them by any party with whom they had any controversy, and no substantive right had accrued from the bringing of the suit, a denial of these rights?

C. Did the requirement that Petitioners, being non-residents who were asserting their rights to sue in the Federal Court, withdraw and permit final decree against them in order to preserve their exception to the action of the court in denying their motion to dismiss without prejudice, leaving no remedy to Petitioners except by appeal, amount to a denial of those rights?

D. Where Petitioners had withdrawn to protect their right to dismiss without prejudice and avoid threats and trial under armed guards and to prosecute their Federal actions, and where, if the trial court had correctly denied their motion it should have dismissed their bill with prejudice, can the court take any other action that would be binding on Petitioners except dismissal with prejudice, without denying to them those rights?

E. Where the Supreme Court of Mississippi holds the rights of Petitioners to have been adjudicated under a

cross-bill which had never been served as required under Mississippi practice, have those rights been denied?

F. Where said Supreme Court treats a trial on the merits of issues made on bill and answer as if it had been a trial on a cross-bill to which Petitioners had demurred and would, under local practice, have a reasonable time to answer if demurrer overruled, and affirms the decree dismissing the original bill on the theory that the action of the trial court, when considered as having been taken on the cross-bill, renders the issues made on bill and answer moot even thorugh no decree *pro confesso*, as required by state practice, or other default, was entered against Petitioners, have Petitioners been denied those rights?

G. Where said Supreme Court decides that the decision on a cross-bill between Petitioners and certain respondents was *res judicata* as to nearly one hundred respondents not parties to the cross-bill and as to issues not raised by the cross-bill, have those rights been denied?

H. Where said Supreme Court decided that a decision on a cross-bill between Petitioners and certain respondents was *res judicata* of all issues between Petitioners and other respondents, and those issues were not the same, and that question had not been raised in the trial court and Petitioners had not been given opportunity to meet it, have those rights been denied?

I. Where said Supreme Court decides that a decision under cross-bills is *res judicata* of rights as between

Petitioners and respondents not parties to the cross-bills and as to issues not involved therein, and the decision was not based on any issue presented to the Supreme Court by any party, are Petitioners denied those rights?

J. Where issues had been tried on bill and answer when the bill would have been dismissed on Petitioners' refusal to proceed after denial of their motion to dismiss without prejudice, does the affirmance of the decree by the Supreme Court on the theory that the same trial might have been had on a cross-bill actually on file, but not made the basis for any issues on the trial, deny to Petitioners those rights?

K. Where one respondent files a cross-bill and thereafter settles with Petitioners the matters at issue in said cross-bill and thereafter proceeds on *ex parte* hearing to judgment on said cross-bill without amending to show such settlement or giving Petitioners opportunity to plead such settlement in defense to such cross-bill, have Petitioners been denied such rights?

L. Did the entry of the final decree granting the prayer of the cross-bill as to which Petitioners had demurred, where Petitioners were not afforded any opportunity to be heard on their demurrer or to plead to the cross-bill, amount to a denial of those rights?

M. Did the action of the court in entering a decree against Petitioners on a cross-bill against them as to which they were entitled to a reasonable time to answer if their demurrer should be overruled, amount to a denial of those rights?

N. Did the overruling of Petitioners' demurrer after their withdrawal, and without notice to them that it would be acted on, amount to a denial of those rights, and did the entry of a final decree without the entry of any default against Petitioners, or the taking of the cross-bill as confessed, as required by state practice, amount to a further denial of those rights?

II.

Under Article III, Section II, Paragraph 1 of the Constitution of the United States, empowering Congress to provide for jurisdiction in United States Courts in diversity cases; and under Judicial Code, Section 24 (1) (28 U. S. C. A. 41 (1)); and under the due process and equal protection clauses of the Fourteenth Amendment:

A. Does a State Court have jurisdiction and authority to deny to Petitioners the right to dismiss without prejudice to their actions in the United States District Court, where no substantial right has accrued in the State Court?

B. Where Petitioners have done all in their power to dismiss without prejudice and were entitled to do so under state practice, does the State Court have power and jurisdiction to render a decree against them and make said decree operate as an adjudication of the issues made and being tried in the Courts of the United States?

C. Where Petitioners, being non-residents, have reasserted their claims in civil actions in the United States Court, and have moved to dismiss their suits on the same

claims in the State Courts, may the State Courts depart from the established state practice to render a final decree against Petitioners, and make its decree binding on the United States Court?

D. Where the Chancery Court of Jasper County and the Supreme Court of Mississippi failed to follow established procedure under the law of said State in the particulars set forth in this Petition did this failure deny to Petitioners, citizens of other states, rights accruing to them as citizens of the United States?

E. Where Petitioners, citizens of other states, claimed that the actions of the State Courts as set forth in this Petition denied their rights under the Constitution and laws of the United States, and the State Courts refused to notice or mention or recognize their claims, and the actions and judgments of the State Courts prevent Petitioners from presenting the merits of their case, are they unconstitutionally denied their rights to an adjudication, as citizens of the United States?

F. Could the State Court require Petitioners to proceed with the trial of their suit under armed guards, where they had elected to withdraw from the State Court and prosecute their claims in the Federal Court, and on their refusal to proceed in the State Court under such circumstances, enter any decree against them which would prejudice their claims in the Federal Court?

STATUTES INVOLVED.

The statutes involved are the due process and equal protection clauses of Article XIV of the Amendments to the Constitution of the United States; Article III, Section II, paragraph 1 of the Constitution of the United States, and Section 24 (1) of the Judicial Code of the United States (28 U. S. C. A. 41 (1)).

SPECIFICATION OF ERRORS.

Petitioners claim that the judgment of the Chancery Court of Jasper County, Mississippi, affirmed by the Supreme Court of Mississippi, denied Petitioners due process of law and the equal protection of the laws in contravention of the Constitution of the United States and particularly Article III, Section II, paragraph 1 (and Judicial Code, Section 24 (1)), and Article XIV, Section I of the Amendments to the Constitution of the United States, the benefit of which was expressly claimed by Petitioners throughout the trial, in the following particulars and the following acts, to-wit:

1. In denying Petitioners their absolute right to dismiss their cause without prejudice, particularly when they were diligently pursuing their actions theretofore brought in the United States District Court pursuant to Section 24 (1) of the Judicial Code.

2. In refusing to grant interlocutory appeal to Petitioners and forcing them to go to trial in the presence of

threats and under armed guard or waive their right to prosecute their suit in person or by counsel.

3. In requiring Petitioners to forego their right to prosecute their suit in person and by counsel, or waive their right to except on appeal to the action of the court in denying their motion to dismiss without prejudice.

4. In calling a special term of court and requiring Petitioners and their witnesses and solicitors to submit to search and to go to trial in an atmosphere of threats and intimidation at a time when said state court was advised that Petitioners had pressed their Federal Court Actions to the point of early trial; and in denying comity to the Federal Court and in refusing to consider or honor the objection of Petitioners setting up their reliance on their Constitutional rights; and in refusing to sit as a Federal Court in the consideration of said Federal Rights relied on by the Petitioners.

5. In holding that the State Court had exclusive jurisdiction to try the issues of the case and refusing to give consideration to Petitioners' asserted Federal Rights.

6. In failing and refusing to pass upon Federal Rights claimed and asserted by Petitioners and in treating the case as if no Federal question was involved.

7. In proceeding to trial when the case was not triable because all parties were not before the court and because two indispensable parties were minors and had not been served with process and were absent from the United

States in its military service, according to pleadings filed in the State Courts claiming, in their behalf, the right to have the suit stayed under the Federal Soldiers and Sailors Relief Act of 1940, (50 U. S. C. A. App. 501 et seq.).

8. In proceeding to trial and judgment on cross-bill which were, on their face, inadequate to support the relief granted.

9. In proceeding to trial on cross-bill which was never served and when Petitioners did not have legal notice that said cross-bill would be acted on.

10. In proceeding to trial on the merits on a cross-bill to which a general demurrer had been interposed without first passing on demurrer.

11. In proceeding to trial on a cross-bill without giving Petitioners time or opportunity to plead after their demurrer to the cross-bill had been overruled.

12. By awarding judgment against Petitioners on a cross-bill for their failure to defend said cross-bill when they were never provided a chance to contest with complainants on said cross-bill.

13. By awarding a decree against Petitioners on a cross-bill against them as to which they had not been given an opportunity to answer as to the merits, and without adjudicating them to be in default, or to have confessed the allegations against them as required by state practice.

14. By the decision of the case by the Supreme Court of Mississippi on a point never presented to or passed on by the lower court or argued in the Supreme Court and which Petitioners never had an opportunity to be heard in either court.

15. By holding that the claim of Petitioners to the right to dismiss their suit in the state court in order to prosecute their actions in the Federal Court was a moot question.

16. In awarding judgment against Petitioners on the cross-bill of Gulf Refining Company after Petitioners and Gulf Refining Company had settled the suit as between them which settlement Gulf Refining Company did not plead or call to the attention of the court awarding said judgment.

17. In holding and decreeing that a judgment against Petitioners on the cross-bill of Gulf Refining Company was *res judicata* as between Petitioners and more than one hundred defendants not parties to said cross-bill and as to issues not raised or passed on in said cross-bill.

18. In affording Respondents the opportunity to plead the judgment of the Chancery Court of Jasper County and affirmed by the Supreme Court of Mississippi as *res judicata* of the actions brought and prosecuted by Petitioners in the United States District Court.

REASONS FOR ALLOWANCE OF WRIT.

The Supreme Court of Mississippi has decided Federal questions of substance not heretofore decided by this Court, and has decided Federal questions in a way not in accord with the applicable decisions of this Court, all as above set forth and as argued in Petitioners' Brief.

Petitioners have not had their day in court. They stand denied by the State Courts of Mississippi a trial on the merits of their claim, with the manifest purpose on the part of Respondents of attempting to plead the State Court judgments as *res judicata* of their Federal Actions. And they stand thus committed by the Mississippi Courts without the scantest notice of their Constitutional Rights which they urged before said Courts at every step in the proceedings.

Petitioners entered voluntarily into the Courts of Mississippi and spent much time, money and effort in the attempt to get their grievances fairly tried on their merits. When it seemed that a fair trial, as recognized by this Court, could not be had, they availed themselves of their Constitutional Right to enter the Federal Court and simultaneously availed themselves of their undoubted right to dismiss the State Court case they had begun. The trial court would not accord them the right to dismiss given them by Mississippi Statutes and court decisions, and later assumed to be their right by the Supreme Court decision. Nor would the trial court nor the Supreme Court of Mississippi grant them interlocutory appeal provided for by Mississippi Statutes to the end that their vital

right to dismiss might be authoritatively settled without the necessity of Petitioners risking the drastic alternative of dismissal with prejudice according to Mississippi practice.

Petitioners nevertheless proceeded diligently with their Federal Court actions and had brought them to the point of immediate trial when the State Court called a special term of court and invited Petitioners to a trial under conditions of tension which would have made a fair trial impossible. When Petitioners filed their written objections setting forth fully their Constitutional Rights and plead with the trial court for the privilege of pursuing their Federal actions, the trial court would not give their pleas the scantest notice.

When Petitioners declined to proceed further the trial court, instead of merely dismissing their bill with prejudice as provided by Mississippi practice, proceeded to a "trial on the merits" on bill and answers and further assumed to adjudicate Gulf Refining Company's cross-bill without any preliminary hearing on Petitioners' demurrer to the cross-bill.

Instead of sustaining the demurrer to the cross-bill, the trial court overruled it. Instead of providing in the order overruling the demurrer that Petitioners should have a reasonable time to plead, as required by Mississippi practice (upon the filing of which pleading by Petitioners the case would not have been triable for at least thirty days), the trial court moved, without pausing and in one continuous hearing, to a final decree adjudicating the issues

of the cross-bill in favor of Gulf Refining Company. Although Petitioners had settled with Gulf, this settlement was not set up in an amendment to Gulf's cross-bill, and Petitioners were not given the opportunity to plead the settlement.

In their appeal to the Supreme Court Petitioners urged their reliance on the rights given by the Constitution of the United States, but the Supreme Court did not mention these Constitutional Rights. In affirming the decree of the trial court the Supreme Court of Mississippi passed over as moot the vital right of Petitioners to dismiss without prejudice and to have the trial court proceed no further than to dismiss their bill with prejudice upon their declining to proceed, and decided the case on the cross-bills alone, which under Mississippi practice were never properly reached by the court below. It failed to take notice that Petitioners and Gulf and settled their controversy, and that the case as between them was moot.

The Supreme Court of Mississippi went much further than that. It predicated an affirmance of the judgment of the lower court on the Ridgeway cross-bill, which had never been served at all and which had never been noticed in any pleading. It held that the decree on Gulf's cross-bill, involving only a limited leasehold interest, adjudicated all of the issues between the Petitioners and the claimants of the fee in the land and of the large number of claimants of various mineral interests, none of whom were parties to the cross-bill. That was an issue not raised by any party, not considered by the trial court, and brought into the case entirely by the Supreme Court

of Mississippi without the benefit of argument and without opportunity to Petitioners to present their contentions with respect to it. In their Supggestion of Error Petitioners urged that such a course violated their Constitutional Rights. Despite the constant urging by Petitioners of their Constitutional Rights the Supreme Court of Mississippi did not notice or mention the pendency of the Federal Court cases, or the presence of any Federal question.

The case thus made has an importance for transcending the interests of Petitioners, great as they are. They have been denied their day in court to assert property rights of enormous value, but the public, too, has a definite stake in the case. It is important that citizens of the several States know, when they are put to the necessity of litigating in other States, whether their Constitutional Rights will be protected; or whether State Courts will be permitted to deny those rights by ignoring them.

Moreover, it is of the utmost importance that this Court determine at what point before the actual satisfaction or final denial of the claim of a litigant in a State Court, the litigant may rescind his action in entering his appearance in the State Court and invoke the diversity jurisdiction of the United States Court. Related questions as to whether motives and circumstances may be considered in determining if State Court action may bar resort to Federal jurisdiction, and if so, whether threats of violence and efforts at intimidation, noticed by the State Court to the extent that it orders the trial to proceed under armed guards in a remote rural community, are such circum-

stances as would require the intervention of Federal jurisdiction, remain unanswered in the jurisprudence of this Court. If this Court should hold that the foregoing matters are to be determined by state law and procedure, then this Court should indicate whether and to what extent it will intervene to determine whether or not federal rights have been violated.

CONCLUSION.

Wherefore, Petitioners pray that this Honorable Court may issue a writ of Certiorari to the Supreme Court of Mississippi to review the judgment and decision in this case, and that said judgment and decision may be reversed and that Petitioners may be accorded their right to dismiss their State Court action without prejudice and permitted to pursue their Federal Court actions; and that full justice may be granted to Petitioners according to law.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. .....

N. L. HUDSON, ET AL.,
Petitioners,

versus

GULF REFINING COMPANY, ET AL.,
Respondents.

BRIEF OF ARGUMENT.

A.

IT IS DUTY OF STATE COURT TO ENFORCE RIGHTS UNDER THE FEDERAL CONSTITUTION. (P. 40.)

Angel v. Bullington, L. Ed. Advance Opinions March 10, 1947, p. 557.
Smith v. O'Grady, 312 U. S. 329, 85 L. Ed. 861.
United States v. Bank of New York & Trust Co., 296 U. S. 463, 80 L. Ed. 331.
Robb v. Connolly, 111 U. S. 624, 38 L. Ed. 542.
McKnett v. St. Louis, etc. Co., 292 U. S. 230, 78 L. Ed. 1227.
Postal, etc. v. Newport, 247 U. S. 464, 62 L. Ed. 1215.
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791.
Crescent City, etc. Co. v. Butcher's Union, 130 U. S. 141, 30 L. Ed. 614.

B.

THIS COURT HAS FINAL SAY WHERE CLAIM IS BASED ON DENIAL OF CONSTITUTIONAL RIGHTS. (P. 41.)

Titus v. Wallick, 306 U. S. 282, 83 L. Ed. 653.
Angel v. Bullington, L. Ed. Advance Opinions March 10, 1947, p. 557.
Broderick v. Rosner, 294 U. S. 629, 79 L. Ed. 1100.
Irving Trust Co. v. Day, 314 U. S. 556, 86 L. Ed. 452.
Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920.
Radio Station v. Johnson, 326 U. S. 120, 89 L. Ed. 2092.
Domorest v. City Bank, 321 U. S. 36, 88 L. Ed. 526.
Pennsylvania General Casualty Co. v. Pennsylvania, 294 U. S. 189, 79 L. Ed. 850.
Steele v. L. & N. R. R. Co., 323 U. S. 192, 89 L. Ed. 173.
Toucy v. New York, etc. Co., 314 U. S. 118, 86 L. Ed. 100.
Lovell v. City of Griffin, 58 S. Ct. 666, 82 L. Ed. 949.
Schuylkill, etc. Co. v. Commonwealth, 296 U. S. 113, 80 L. Ed. 91.
Milkwagon Drivers, etc. v. Meadowmoor Dairies, 312 U. S. 715, 85 L. Ed. 1145.
Chambers v. State, 309 U. S. 227, 84 L. Ed. 716.
United Gas, etc. Co. v. State of Texas, 303 U. S. 123, 82 L. Ed. 702.
Chicago, etc. Co. v. Rambo, 298 U. S. 99, 80 L. Ed. 1066.

C.

PETITIONERS CONTEND THAT THEY HAVE BEEN DENIED DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS, AND RIGHTS ACCRUING TO THEM UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES, BY THE ACTS AND DECISIONS OF THE STATE COURTS OF MISSISSIPPI. (P. 43.)

I. In Overruling Petitioners' Motion to Dismiss Without Prejudice. (P. 44.)

Mississippi Code of 1942, Sections 1538, 1539.
Chicago, etc. Co. v. Union, etc. Co., 109 U. S. 702, 27 L. Ed. 1081.
State v. Hemmingway, et al, (Miss. 1891) 69 Miss. 491, 10 So. 575.
Canadian, etc. Co. v. Fitzpatrick, (1893) 71 Miss. 350, 14 So. 270.
Russell v. Denson, (1911) 98 Miss. 862, 54 So. 439.
Adams v. Lucedale, etc. Co., (1917) 113 Miss. 608, 74 So. 435.
Griffith's Mississippi Chancery Practice, 534.

II. In Denying Interlocutory Appeal to Settle Petitioners' Right to Dismiss and Calling a Special Term and Forcing Petitioners to Go to Trial in the Face of Threats and Armed Guards When Petitioners Were Insisting on Their Constitutional Rights and Their Right to Pursue Federal Actions Free From Threats and Intimidation. (P. 48.)

Mississippi Code of 1942, Sections 1148, 1217, and 1957.
Mitchell et al v. Film Transit Co. et al (1934) 194 Miss. 550, 13 So. (2d) 154.

Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543.
Fisher v. State, 145 Miss. 116, 110 So. 361.
Hebert v. Louisiana, 272 U. S. 312, 71 L. Ed. 270.
Snyder v. Massachusetts, 291 U. S. 96, 78 L. Ed. 674.
Rogers v. Peck, 199 U. S. 425, 50 L. Ed. 256.
Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682.
Angel v. Bullington, L. Ed. Advance Opinions March 10, 1947, p. 557.
Harrison v. St. L. & S. F. Railroad Co., 232 U. S. 318, 58 L. Ed. 621.
Missouri, etc., Co. v. Larabee, 234 U. S. 459, 58 L. Ed. 1398.
Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.
Donald v. Philadelphia, etc. Co., 241 U. S. 329, 60 L. Ed. 1027.
Terrell v. Burke, etc. Co., 257 U. S. 529, 66 L. Ed. 352.
New York, etc. Co. v. Head, 234 U. S. 149, 58 L. Ed. 1259.
United States v. Bank of New York, 296 U. S. 463, 80 L. Ed. 331.
Commonwealth v. Williams, 294 U. S. 176, 79 L. Ed. 841.
Markham v. Allen, 326 U. S. 490, 90 L. Ed. 256.

III. In Proceeding to Judgment Against Petitioners on Ex Parte Hearing at a Time When the Case Was Not Triable Because of the Absence of Necessary Parties. (P. 56.)

Mississippi Code of 1942, Sections 1314, 1323.
Paepcke Leicht Lbr. Co. v. Savage, 137 Miss. 11, 101 So. 709.
Smith v. Denny, 90 Miss. 34, 43 So. 479.
Lamar Life Ins. Co. v. Billups, 175 Miss. 771, 169 So. 32.
Dorsey, et al v. Sullivan, 24 So. (2d) 852.
Griffith's Mississippi Chancery Practice, Sections 263 and 556.

IV. In Proceeding to a "Trial on the Merits", Including Decree on Cross-Bill, When Mississippi Practice Permitted Only Dismissal With Prejudice After Petitioners Declined to Proceed Further. (P. 58.)

Mitchell v. Film Transit Co., 194 Miss. 550, 13 So. (2d) 154.
Baird v. Bardwell, et al, 60 Miss. 164.
Griffith's Mississippi Chancery Practice, Pars. 538 and 562.

V. In Awarding Judgment Against Petitions on the Cross-Bill of the Ridgeways. (P. 60.)

Mississippi Code of 1942, Section 1296.
Majure v. Johnson, et al, 192 Miss. 810, 7 So. (2d) 545.
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791.
Brinkerhoff, etc. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107.
American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231.
Chase National Bank v. Norwalk, 291 U. S. 431, 78 L. Ed. 894.

VI. In Proceeding to Judgment on Gulf's Cross-Bill Without Giving Petitioners the Opportunity to Answer and Defend it After the Demurrer to the Cross-Bill Was Overruled and When Petitioners Had Settled With Gulf. (P. 62.)

Mississippi Code of 1942, Sections 1240, 1241, 1244, 1286, 1289, 1296, 1297, 1298, 1310.
19 American Jurisprudence, Equity, Paragraph 318, page 227.
Thomas v. Worcester, 114 U. S. 104, 29 L. Ed. 105.
Hovey v. Elliott, 167 U. S. 409, 418, 42 L. Ed. 215.

Malinsky v. People, 321 U. S. 401, 89 L. Ed. 1029.
Titus v. Wallick, 306 U. S. 282, 83 L. Ed. 653.
Hooven, etc. Co. v. Evatt, 324 U. S. 652, 89 L. Ed. 1252.
Schuylkill Co. v. Commonwealth of Pennsylvania, 296 U. S. 113, 80 L. Ed. 91.
Lawrence v. State Tax Commission, 286 U. S. 276, 79 L. Ed. 1102.
Ancient, etc. Order v. Michaux, 2799 U. S. 737, 73 L. Ed. 931
Southern Pacific Co v. State, ex rel, 325 U. S. 761, 89 L. Ed. 1915.
United States Gas. etc. Co. v. Texas, 303 U. S. 123, 82 L. Ed. 702.
Chicago, etc. Co. v. Rambo, 298 U. S. 99, 80 L. Ed. 1066.
Williams v. State of North Carolina, 325 U. S. 226, 89 L. Ed. 1577.
Adam v. Saenger, 303 U. S. 59, 82 L. Ed. 649.
International Harvester Co. v. Wisconsin, 322 U. S. 435, 88 L. Ed. 1373.
Chase National Bank v. Norwark, 291 U. S. 431, 78 L. Ed. 894.
American Surety Co. v. Baldwin, 287 U. S. 156. 77 L. Ed. 231.

VII. In Awarding Judgment Against Petitioners and in Favor of Gulf Refining Company in a Case Not Justiciable Because it Had Become Moot. (P. 71.)

American Wood Paper Co. v. Heft, 8 Wall. 333, 19 L. Ed. 379.
South Spring, etc. Co. v. Amador, etc. Co., 145 U. S. 300, 36 L. Ed. 712.
Dakota County v. Glidden, 113 U. S. 222, 28 L. Ed. 981.
California v. San Pahlo, etc. Co., 149 U. S. 308, 37 L. Ed. 747.

Mills v. Green, 159 U. S. 651, 40 L. Ed. 293.
Natural Milk Products Association v. San Francisco, 317 U. S. 423, 87 L. Ed. 375.
C. I. O. v. McAdory, 325 U. S. 472, 89 L. Ed. 1741.

VIII. In Awarding Judgment Against Petitioners on Cross-Bills which on their Face Showed No Right to Relief and to Which a Demurrer Had Been Interposed. (P. 74.)

Mississippi Code of 1942, Section 1325.
Griffith's Mississippi Chancery Practice, Paragraphs 379, 380 and 384.
Buckingham v. Wesson, (1877) 54 Miss. 526.
Vaughan v. Hudson, (1882) 59 Miss. 421.
Carter v. Harvey, (1890) 7 So. 286.
Hinds, et al v. Martin (C. C. A. 5, 1923) 286 Fed. 653.
30 Corpus Juris Secundum, page 788.
Ayres v. Carver, 58 U. S. 591, 15 L. Ed. 179.
Providence, etc. Co. v. Goodyear, 76 U. S. 807, 19 L. Ed. 587.
Ayres v. Chicago, 101 U. S. 184, 25 L. Ed. 838.
Miller, et al v. Ricky, 218 U. S. 258, 54 L. Ed. 1032.
Moore v. New York, etc. Exchange, 270 U. S. 593, 70 L. Ed. 750.
Ladner v. Ogden, (1856) 31 Miss. 332.
Gilmer v. Felhour, (1871) 45 Miss. 627.
Thomason v. Neely, (1876) 50 Miss. 310.
Belcher v. Wilkerson, (1877) 54 Miss. 677.
Jacks v. Bridwell, (1876) 51 Miss. 881.
DeWeese v. DeWeese, (1877) 55 Miss. 315.
Sigman v. Lundy, (1889) 66 Miss. 522, 6 So. 245.
Dows v. The City of Chicago, 11 Wall. 108, 20 L. Ed. 65.
Holgate v. Eaton, 116 U. S. 33, 29 L. Ed. 538.
California, etc. Co. v. United States, 192 U. S. 355, 48 L. Ed. 476.

Eustice v. Holmes, 52 Miss. 314.
Russell v. Hickory, 116 Miss. 46, 76 So. 825.
Longmeyer v. Mars, 124 Miss. 77, 86 So. 753.
Eastman v. Wyatt Lbr. Co., 102 Miss. 313, 59 So. 93.
Lyon Co. v. Ratliff, 129 Miss. 342, 92 So. 229.

IX. By The Decision of the Supreme Court of Mississippi on a Point Never Presented to or Passed on by the Lower Court and Which Petitioners Never Had a Chance to Defend. (P. 87.)

Davis v. Wechsler, 263 U. S. 22, 68 L. Ed. 143.
Angel v. Bullington, L. Ed. Advance Opinions March 10, 1947, p. 556.
Saunders v. Shaw, 244 U. S. 317, 61 L. Ed. 1163.
Myles Salt Co. v. Iberia, etc. District, 239 U. S. 478, 60 L. Ed. 392.
Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 1027.
Helis v. Ward, 308 U. S. 365, 84 L. Ed. 327.
Brinkerhoff o. v. Hill, 281 U. S. 673, 74 L. Ed. 1107.
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791.
Roller v. Holly, 176 U. S. 520, 44 L. Ed. 520.
American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231.
Georgia Railway, etc. Co. v. City of Decatur, 294 U. S. 165, 79 L. Ed. 1365.

X. By the Decision of the Supreme Court of Mississippi Affirming a Judgment Against Petitioners on the Cross-Bills of Gulf Refining Company and the Ridgways Holding Said Judgment to be Res Judicata as Between Petitioners and the Defendants Not Parties to Said Cross-Bills and as to Issues Not Involved in Said Cross-Bills, and When This Point Was Not Involved in the Decision of the Lower Court or Argued Before Said Supreme Court. (P. 95.)

Hansberry v. Lee, 311 U. S. 32, 85 L. Ed. 22.

Riley, et al v. New York Trust Co., 315 U. S. 343, 86 L. Ed. 885.

Postal, etc. Co. v. Newport, 247 U. S. 464, 62 L. Ed. 1215.

Chase National Bank v. Norwalk, 291 U. S. 431, 78 L. Ed. 894.

Van Zandt v. Town of Braxton, 149 Miss. 461, 115 So. 557.

Watkins v. State Board, 170 Miss. 26, 154 So. 277.

Hayes, et al v. First Joint Stock Land Bank, 174 Miss. 880, 165 So. 605.

Russell v. Federal Land Bank, 180 Miss. 55, 176 So. 737.

Bass v. Borries, 116 Miss. 419, 77 So. 189.

Coleman v. Smith, 124 Miss. 604, 87 So. 7.

Brooklyn v. National City Bank, 102 U. S. 14, 26 L. Ed. 61.

34 Corpus Juris, Judgments, Section 1438, page 1014.

Kapiolani Estate v. Atcherley, 238 U. S. 119, 59 L. Ed. 1229.

Bigelow v. Old Dominion, etc. Co., 225 U. S. 111, 56 L. Ed. 1009.

Old Colony Trust Co. v. Omaha, 230 U. S. 100, 57 L. Ed. 1410.

Radford v. Myers, 231 U. S. 725, 58 L. Ed. 454.
Radio Corporation of America v. Radio Engineering Laboratories, 293 U. S. 1, 79 L. Ed. 163.
Wood v. Davis, 7 Cranch 271, 3 L. Ed. 339.
True-Hixon Lbr. Co. v. Thorne, 171 Miss. 783, 158 So. 909.
Russell v. Place, 94 U. S. 606, 24 L. Ed. 214.
Desollar v. Hanscome, 158 U. S. 216, 39 L. Ed. 956.
50 Corpus Juris Secundum, Judgments, Paragraph 765, page 293.
Chantangco v. Abaroa, 218 U. S. 476, 54 L. Ed. 1116.
Litchfield v. Goodnow, 123 U. S. 549, 31 L. Ed. 199.

CONCLUSION. (P. 105.)

Yick Wo v. Hopkins, 118 U. S. 356, 300 L. Ed. 220.
Myles Salt Co. v. Board of Commissioners, 239 U. S. 478, 60 L. Ed. 392.
State of Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

No. .....

N. L. HUDSON, ET AL.,
Petitioners,

versus

GULF REFINING COMPANY, ET AL.,
Respondents.

BRIEF ON BEHALF OF PETITIONERS.

The pattern for this Petition is set by this Court's opinion in *Angel v. Bullington,* (February 17, 1947) L. Ed. Advance Opinions March 10, 1947, Page 557. Bullington was denied relief by the Supreme Court of North Carolina on what that court conceived to be "the adjective law of the State". He had asserted that such a holding would deny him his constitutional rights, and the Supreme Court of North Carolina chose not to deal directly with those rights.

Bullington thereupon abandoned his state court proceeding and sought the same relief in an action in the

Federal Court. This Court held that he was estopped to prosecute his Federal action by the judgment rendered in the state court case. Bullington's fatal mistake was that he failed to call on this Court to correct the error of the North Carolina Supreme Court in failing to give him his constitutional rights.

The predicament in which Petitioners are now cast parallels very closely that of Bullington. Here the Supreme Court of Mississippi has "put a Federal claim aside, as though it were not in litigation, by the talismanic word 'procedure' ", and has "concluded an adjudication of a Federal question even though it was not couched in those terms". The constitutional rights of Petitioners, stressed at every stage of their state court litigation, have been "defeated under the name of local practice"; the action of the Mississippi Court here offends just as directly as that of the North Carolina Court there against what this Court there said: "A state court cannot sterilize Federal claims by putting on the adjudication a local label." Petitioners, heeding the mandate of that case, are calling on this Court to give them relief "by the grace of certiorari" to escape the possibility that they, like Bullington, will have their Federal actions cut off by failure to invoke review by this Court.

A.

It is Duty of State Court to Enforce Rights Under the Federal Constitution.

The Court will understand that throughout these proceedings Petitioners have emphasized their reliance on

their Federal rights. Practically the only proof put in by them at the time of the hearing of their motion to dismiss was copies of the complaints filed by them in their Federal Court actions (R. 794, Appendix 62). At the crucial time when the trial court was attempting to force Petitioners to trial under armed guards Petitioners burned their bridges behind them and staked their main reliance on their claim that they were not being granted due process of law and the equal protection of the laws (R. 724, Appendix 64). Later in their assignment of errors (R. 1248, Appendix 79) they again emphasized this reliance. In spite of all that, neither the trial court nor the State Supreme Court once mentioned any Federal right. It was not lawful for the State Courts of Mississippi thus to ignore Constitutional rights:

> "That Constitution is the supreme law of the land, and 'upon the state courts, equally with the courts of the union, rests the obligation to guard and enforce every right secured by that Constitution'." *Smith v. O'Grady,* 312 U. S. 329, 85 L. Ed. 861.

To like effect is *United States v. Bank of New York & Trust Co.,* 296 U. S. 463, 80 L. Ed. 331, citing *Robb v. Connolly,* 111 U. S. 624, 28 L. Ed. 542, wherein attention is called to the fact that this Court gives effect to:

> "* * * such methods of procedure as shall serve to conciliate the distinct and independent tribunals of the states and of the union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States."

See also:

McKnett v. St. Louis, etc. Co., 292 U. S. 230, 78 L. Ed. 1227;
Postal, etc. v. Newport, 247 U. S. 464, 62 L. Ed. 1215;
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791;
Crescent City, etc. Co. v. Butcher's Union, 130 U. S. 141, 30 L. Ed. 614.

B.

This Court Has Final Say Where Claim is Based on Denial of Constitutional Rights.

It is plain that the Court is not dealing here with a case where the decision of the Supreme Court of Mississippi could be sustained because it is placed upon adequate, independent non-Federal grounds. Every single procedural step taken was challenged as failing to afford due process of law and the equal protection of the law. The Constitutional question, therefore, lies at the threshold of the decision as it relates to every step in the proceeding. The non-Federal question cannot be reached without stepping over the Federal question which lies at the threshold.

It is plain, too, that this is not one of the cases where this Court feels called upon to approach the decision of a State Court "with deference"—cf. *Titus v. Wallick*, 306 U. S. 282, 83 L. Ed. 653. There is not the slightest dispute about what was done at every stage of the proceeding and how it was done. The Court, therefore, looks at the undisputed facts and sees if what was done squares with what the Constitution requires to be done.

The question of whether the Mississippi Courts granted Petitioners the protection of Mississippi procedural rules, and also whether those rules afford due process of law is, from the outset, a Federal question. Its laws of procedure are "fettered" at every step by the requirements of the Fourteenth Amendment—cf. *Angel v. Bullington, supra; Broderick v. Rosner,* 294 U. S. 629, 79 L. Ed. 1100.

Probably several dozen cases could be listed in which this Court has held that it reserves to itself the right to examine what a State Court has done in the name of its adjective law and determines for itself whether what was done offended against Constitutional guaranties. It will be sufficient to list a few:

Irving Trust Co. v. Day, 314 U. S. 556, 86 L. Ed. 452;
Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920;
Radio Station v. Johnson, 326 U. S. 120, 89 L. Ed. 2092;
Domorest v. City Bank, 321 U. S. 36, 88 L. Ed. 526;
Pennsylvania General Casualty Co. v. Pennsylvania, 294 U. S. 189, 79 L. Ed. 850;
Steele v. L. & N. R. R. Co., 323 U. S. 192, 89 L. Ed. 173;
Toucy v. New York, etc. Co., 314 U. S. 118, 86 L. Ed. 100;
Lovell v. City of Griffin, 58 S. Ct. 666, 82 L. Ed. 949;
Schuylkill, etc. Co. v. Commonwealth, 296 U. S. 113, 80 L. Ed. 91;
Milkwagon Drivers, etc. v. Meadowmoor Dairies, 312 U. S. 715, 85 L. Ed. 1145;

Chambers v. State, 309 U. S. 227, 84 L. Ed. 716;
United Gas, etc. Co. v. State of Texas, 303 U. S. 123, 82 L. Ed. 702;
Chicago, etc. Co. v. Rambo, 2989 U. S. 99, 80 L. Ed. 1066.

C.

ARGUMENT.

Petitioners claim that the actions taken by the trial court and by the Supreme Court of Mississippi in affirming the final decree of the lower court accomplished the taking of their property without due process of law, and the denial to them of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. It is contended that each succeeding step in the litigation standing alone denied these constitutional rights; and that the succession of acts, considered as a whole, results in the denial of Petitioners' constitutional rights without possibility of doubt.

The various steps in the State Court litigation will be considered in the order taken, it being understood that in each instance Petitioners contend that each step, standing alone and in conjunction with the other steps, violates their said constitutional rights.

I.

In Overruling Petitioners' Motion to Dismiss Without Prejudice.

It cannot be doubted that Petitioners had the absolute right to dismiss their State Court case without preju-

dice under the law of Mississippi. Following the decision of this Court in *Chicago, etc., Co. v. Union, etc., Co.*, 109 U. S. 702, 27 L. Ed. 1081, the Mississippi Court had, in the early decisions, been inclined to base the right to dismiss an equity case on principles of common law. See e. g. *State v. Hemmingway, et al*, (Miss. 1891) 69 Miss. 491, 10 So. 575; *Canadian, etc. Co. v. Fitzpatrick*, (1893) 71 Miss. 350, 14 So. 270; and *Russell v. Denson*, (1911) 98 Miss. 862, 54 So. 439. Finally in *Adams v. Lucedale, etc. Co.*, (1917) 113 Miss. 608, 74 So. 435, the Mississippi Court declared that the right of a complainant to dismiss his equity case was given by statute as well as by common law and that the right was absolute:

> "It would not be contended that a plaintiff in a lawsuit may not suffer a non-suit, and we are unable to see why the statutory right could be denied by a chancellor . . . the chancellor has no more power or discretion . . . than a circuit judge.
>
> "After a thorough examination of the authorities we are convinced that the rule supported by all of the authorities, or at least by the great weight of authority, is to the effect that chancery or equity courts are controlled by a rule similar to our statutory rule. The only limitation of the rule is applied to the cases wherein the defendant has secured some right by the filing of the bill which would be destroyed by the dismissal of the bill. Even then it is not a matter of discretion with the chancellor, it is a right of the defendant which controls. The discretion of the court may be exercised when the time has passed for the plaintiff or complainant to dismiss as a matter of right; before that time there is no discretion.

> "In this state the right to suffer a non-suit is fixed by the statute quoted above, and, in terms we think this statute is applicable to equity courts. In equity courts the right ceases after the cause has been submitted to the chancellor; in law courts, after the case has been submitted to the jury. Probably the statute was not needed in equity practice, the right to dismiss already existed, but to make sure, the legislature made it apply to all courts wherein it was already applicable . . ."

The statutory right to dismiss is embraced in Sections 1538 and 1539 of the Mississippi Code of 1942, which are set forth on Page 6 of the Appendix.

Judge Griffith, Presiding Justice of Division B of the Supreme Court of Mississippi, in his work on Mississippi, Chancery Practice, thus epitomizes the rule in Paragraph 534 of that work:

> "The right of a complainant to take without prejudice a voluntary dismissal, said to have been an original right in equity, is now placed beyond all question by our statutes; the privilege continues up to the time when the cause has been submitted to the chancellor for final decision upon the merits of the case . . ."

The fight in the State Court case raged around the question of whether the defendants in that case had acquired certain superior rights bringing the case within the exception to the rule permitting dismissal. No such question is here presented, as the Supreme Court of Mississippi has not indicated that it gave serious consideration to the contention that Petitioners had lost their

right to dismiss because of the supposed acquisition by Respondents of some superior right to the maintenance of the State Court action.

The fact is that the decision of the Mississippi Supreme Court proceeds on the assumption that Petitioners did have the absolute right to dismiss their case, and the recognition of that right to dismiss is implicit in everything the Mississippi Court said. If that Court had entertained the slightest doubt of Petitioners' right to dismiss, it would have been very simple to have based the decision on the absence of the right to dismiss. The circuitous course followed by the decision of the Supreme Court of Mississippi could have been avoided if that Court had not recognized the absolute right to dismiss. When the Supreme Court of Mississippi said, in its opinion, (Appendix, Page 82): "Had there been no cross-bills, it may have been that the complainants would have had the right to dismiss, as they sought to do, . . ." It is clear that the Supreme Court did recognize the absolute right of Petitioners to dismiss.

Any consideration of whether the Petitioners were denied due process of law, therefore, must proceed on the assumption that the trial court committed error in refusing to permit Petitioners to dismiss their State Court case. Whether after such dismissal the trial court should have retained the crosss-bills is a matter for further argument. The right to dismiss is one thing; the retention of the cross-bill is another thing. We repeat, therefore, that a consideration of this whole case must start with

the predicate that the right of Petitioners to dismiss was plain, and that the chancellor committed error when he denied them that right. It should be borne in mind also that the chancellor wrongfully denied Petitioners the right to dismiss when he had before him copies of the complaints Petitioners had filed in the United States District Court (R. 794 et seq. Appendix 62.)

From that point on the chancellor was running in competition with the Federal actions and that fact was kept constantly before him by Petitioners and the constitutional rights claimed by Petitioners must be judged in the light of the fact that the actions of the State Courts were taken with full knowledge that those actions would, and did, impinge upon the jurisdiction of the Federal Court.

In denying Petitioners the right to their day in court on the merits of their controversy by the series of steps which will be discussed, the State Courts started out with a clear error in the first step taken. That fact ought to be borne in mind also in judging the efforts of Petitioners to safeguard their constitutional rights. What the Supreme Court of Mississippi once said, in reversing a chancellor for refusing to permit a complainant the right to dismiss his case without prejudice, is pertinent—*Russell v. Denson;* (1911) 98 Miss. 862, 54 So. 439:

> "Keeping always in view the fact that the purpose of the organization of courts is to give every citizen an opportunity to fairly litigate his supposed grievances on the merits . . . We think the court below erred . . . in not allowing the bill to be dismissed

without prejudice . . . No suitor should ever be defeated of a trial on the merits of his cause, except in case of inexcusable neglect."

II.

In Denying Interlocutory Appeal to Settle Petitioners' Right to Dismiss and Calling a Special Term and Forcing Petitioners to Go to Trial in the Face of Threats and Armed Guards When Petitioners Were Insisting on Their Constitutional Rights and Their Right to Pursue Federal Actions Free From Threats and Intimidation.

Under Section 1148 of the Mississippi Code of 1942 it is provided:

> "An appeal may in sound discretion be granted by the chancellor in term time, or in vacation, from any interlocutory order or decree . . . or when having sustained or overruled . . . a motion he may think an appeal proper in order to settle all the controlling principles involved in the cause . . ."

Any judge of the Supreme Court is given power, by Section 1957 of the same Code, to grant such interlocutory appeal where the chancellor has refused.

Petitioners promptly applied for such an interlocutory appeal, and the chancellor promptly overruled their application (R. 722-3), and Petitioners thereuon applied to a judge of the Supreme Court and that application was also denied (R. 1326). The next regular term of court at Pauling, where the case was pending, would not convene until the second Monday in July (Appendix 1), and in

the five months elapsing between the application and the trial date the Supreme Court certainly would have passed on the appeal and settled whether Petitioners did have the right to dismiss without prejudice. It was extremely urgent that Petitioners be given this opportunity to test finally their right to dismiss because of the rule of Mississippi practice providing that a litigant waives his right to dismiss without prejudice if he goes to trial on the merits—see e. g. *Mitchell et al v. Film Transit Co., et al,* (1943) 194 Miss. 550, 13 So. (2d) 154, from which the fifth syllabus is quoted:

> "Where guardian proceeded with trial after his motion to non-suit chancery case was overruled as if no motion had been made, he could not thereafter complain of order overruling motion."

In passing on the action of the chancery court in forcing Petitioners to go to trial at the special term or waive, under the foregoing rule, the clear error done them by the court in refusing their motion to dismiss, this Court should bear in mind the threats against Petitioners, their witnesses and attorneys, of which the chancellor took official cognizance in his letter of March 26, 1946 (R. 730, Appendix 63). The situation as it appeared to the chancellor was manifestly so tense that he thought it necessary to get his twelve "men of character and courage" from the opposite side of the county from the county seat of the First District, Paulding; and that he desired that his disclosure be kept confidential so that the public might have no notice of his action.

It is hard to conceive how such a drastic step could be kept from the knowledge of people in a rural community like this. Paulding is a village of about one hundred persons, situated about twelve miles from a railroad and thirty-five miles from any town which would be rated above the village class. The statutes of Mississippi give it a maximum of twelve regular days of chancery court per year (Appendix 1-2). It is accessible only by unpaved roads which meander through the rugged countryside—a fact which would necessarily loom large in the consciousness of a litigant or witness to whom protection would be afforded only while they were in the courtroom. At all events, what the chancellor desired to be kept confidential would certainly become public knowledge as soon as these special deputies began to search "every person who comes into the courtroom".

This letter from the chancellor constitutes the sole evidence of what transpired with respect to the furnishing of these special deputies. It is important to consider this in event any attempt should be made to speculate as to what actually transpired at the special term. This much is certain: more than a month before the convening of the special term the chancellor stated: "I am directing the sheriff to appoint twelve deputies . . . to attend the special term of court . . .", and this was followed by the unequivocal statement that it was the chancellor's purpose "to see that they are protected while attending court". The invitation to Petitioners to attend court carried the assurance of the protection outlined in this letter. It is unthinkable that the assured protection would not be furnished.

Under the circumstances set forth in this letter it is clear that "no trial in the true sense" could be afforded Petitioners—see the language of Mr. Justice Holmes in *Moore v. Dempsey,* 261 U. S. 86, 71 L. Ed. 543. The Supreme Court of Mississippi has itself condemned a trial attempted under such circumstances—*Fisher v. State,* 145 Miss. 116, 110 So. 361:

> "What is a fair trial? . . . There must not only be a fair and impartial jury and a learned and upright judge to instruct the jury and pass upon the legal questions, but there ought to be an atmosphere of calm, in which the witnesses can deliver their testimony without fear and intimidation, and in which the attorneys can assert the defendant's rights freely and fully, and in which the truth may be received and given credence without fear of violence . . ."

This Court has consistently required also "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"—*Hebert v. Louisiana,* 272 U. S. 312, 71 L. Ed. 270; and has rejected any course of action which "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".—See *Snyder v. Massachusetts,* 291 U. S. 96, 78 L. Ed. 674; *Rogers v. Peck,* 199 U. S. 425, 50 L. Ed. 256; *Brown v. Mississippi,* 297 U. S. 278, 80 L. Ed. 682.

It is necessary also to consider the attempt of the state court to force Petitioners to trial at the special term in the light of what was happening in their Federal actions

which they, as non-residents, were prosecuting with desperate haste, in an effort to procure a trial in an atmosphere of calm—it being remembered that "diversity jurisdiction . . . was put into the Constitution so as to prevent discrimination against outsiders . . .". *Angel v. Bullington, supra.* The full picture of what Petitioners had accomplished and were doing in the Federal Court was brought before the chancellor (R. 724, et seq., Appendix 64, et seq.), and it appeared that Petitioners had beaten back all efforts to dismiss their actions and abate them and had taken their testimony and that the Federal Court was ready to proceed with trial in an atmosphere "free of threats or intimidation". The plea then made to the Chancellor by Petitioners was based entirely on their constitutional rights (R. 728, Appendix 69). The Federal Court had entered its order overruling Respondents' motions to dismiss just eleven days before the chancellor wrote his letter of March 26th (R. 734). It is clear that if the chancellor had permitted the state court litigation to go on to the regular time of trial on the second Monday of July, the Federal Court would have completed the trial of the actions on their merits. What the state court did, therefore, was done deliberately and with full knowledge of the effect such action would have on the Petitioners in their effort to obtain a trial in the Federal Court.

In the light of all this the trial court treated the objection of Petitioners as a renewal of their motion to dismiss without prejudice, and overruled this motion again (R. 749-B, Appendix 77), and proceeded to a so-called

"hearing on the merits" in the absence of Petitioners, who had declined to proceed further, choosing to stand on their constitutional rights rather than face the threats mentioned by the chancellor and go through a trial which could have been nothing but a farce, and waive the error, now virtually admitted, of the court below in denying them the right to dismiss.

This forcing of the State Court case to trial out of its regular order under these circumstances and in direct disregard of the Federal rights so earnestly presented by Petitioners constitutes a direct impingement upon the jurisdiction of the Federal Court which was proceeding with Petitioners' Federal actions. What this court said in *Harrison v. St. L. & S. F. Railroad Co.*, 232 U. S. 318, 58 L. Ed. 621, applies in principle here:

> "It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its Constitutional authority is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it."

In a decision rendered about the same time this court had something more to say (*Missouri, etc. Co. v. Larabee*, 234 U. S. 459, 58 L. Ed. 1398) about the unconstitutionality of any state action "which burdened or impeded the right of free access to the courts of the United States". And this court has made it clear all along that such inhibitions apply

to attempted exercise of judicial power by a state as well as legislative and executive power—See *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Donald v. Philadelphia, etc. Co.*, 241 U. S. 329, 60 L. Ed. 1027; *Terrell v. Burke, etc. So.*, 257 U. S. 529, 66 L. Ed. 352; and *New York, etc. Co. v. Head*, 234 U. S. 149, 58 L. Ed. 1259.

The reluctance of the United States District Court to engage in a race with the Chancery Court of Jasper County was natural and reciprocity in that regard by the State Court was clearly its duty—*United States v. Bank of New York*, 296 U. S. 463, 80 L. Ed. 331.

The error of the Chancery Court of Jasper County, Mississippi, is understandable upon an examination of the urgings of Respondents' counsel appearing on pages 73 et seq. of the Appendix. The chancellor was fervently importuned to proceed with the case by the representation of counsel that the State Court had exclusive jurisdiction—see e. g. the statement of Mr. Green at page 73 of the Appendix: "We thought and still think that the exclusive jurisdiction to adjudicate this case is vested in this court". An examination of the succeeding pages of the Appendix will show that every single attorney representing the various Respondents stated his opinion that the State Court had exclusive jurisdiction. One attorney who had apparently conceded that the Federal Court had concurrent jurisdiction was at pains to correct that concession and join the others in maintaining that the State Court alone had jurisdiction (Cf. Buchanan, Appendix, pages 73-75).

Apparently the learned chancellor was induced by these representations of distinguished counsel to turn his back on the contrary rule so clearly announced by this court in its more recent decisions—*Commonwealth v. Williams*, 294 U. S. 176, 79 L. Ed. 841, *Markham v. Allen*, 326 U. S. 490, 90 L. Ed. 256.

III.

In Proceeding to Judgment Against Petitioners on Ex Parte Hearing at a Time When the Case Was Not Triable Because of the Absence of Necessary Parties.

It is undisputed that Claudies Newell and Paul Ellis Newell were parties defendant to the suit brought by Petitioners (e. g. R. 2, 14, etc.), and that they were claiming title to an interest in several forty-acre tracts involved in the suit. It is further undisputed that they were minors and that service of process never had been obtained on them. All of this is confirmed by the first pleading filed on behalf of the defendants (R. 119-120, Appendix 15-16), in which the court was advised that these two minors had not been served with summons, and that they were absent from the country in the military service. Under those circumstances the case was not triable at all. No entry of appearance had been made for those minors and none could be made because they were minors.

This suit was brought under Sections 1314 and 1323 of the Mississippi Code of 1942, and under those statutes all persons claiming an interest in the land, title to which is sought to be confirmed, must be made parties defen-

dant. *Paepcke Leicht Lbr. Co. v. Savage*, 137 Miss. 11, 101 So. 709; *Smith v. Denny*, 90 Miss. 434, 43 So. 479; *Lamar Life Ins. Co. v. Billups*, 175 Miss. 771, 169 So. 32; *Dorsey, et al v. Sullivan*, 24 So. (2d) 852. The last named case was decided a little more than a year ago, and settles this question beyond possibility of doubt. Therein the Supreme Court of Mississippi made two quotations from Griffith's Mississippi Chancery Practice, Sections 263 and 556, which settle this point:

> "* * * the court will not proceed to a final decree as to any defendant until the cause is triable as to all the defendants * * *
>
> "Where there are several defendants, the cause is not ready for trial as to one, until ready as to all of the defendants * * *"

In the face of these clear and unequivocal holdings of the Mississippi Supreme Court how is it possible to think for a moment that this default against Petitioners can be sustained when the case was not triable at the time? There is not any claim that this rule of law had been changed or modified in any way. When Petitioners declined to proceed in the case they knew that the court could take no valid action in it. Petitioners could not have insisted on a trial, and if the case had gone to trial under the authorities cited, any decree rendered would have been a nullity. Is it possible that the rule is held not to work reciprocally? Are these non-residents of Mississippi to be denied the protection of Mississippi procedural statutes and decisions admitted to be the law of the State at this moment? It is perfectly clear that this

entire proceeding was void because the case was not then triable—and this result is reached without considering the sworn averments of the motion for stay to the effect that the absent minors would be denied rights under the Soldiers' and Sailors' Relief Act.

IV.

In Proceeding to a "Trial on the Merits", Including Decree on Cross-Bill, When Mississippi Practice Permitted Only Dismissal With Prejudice After Petitioners Declined to Proceed Further.

Under Mississippi procedure, when Petitioners declined to proceed further at the special term of chancery court the only thing the chancellor could do was to dismiss their bill with prejudice:

> "In order to carry out his purpose the guardian should have declined to proceed with the trial and thereupon the defendant would have been entitled to a dismissal with prejudice, which would have been a final judgment appealable by the guardian."
>
> *Mitchell v. Film Transit Co., 194 Miss. 550, 13 So. (2d) 154.*

That is the latest pronouncement of the Supreme Court of Mississippi, and is in a case involving procedural questions exactly like this one—even to the point of involving a cross-bill by the Transit Company.

The Supreme Court of Mississippi had, in 1882, decided the case of *Baird v. Bardwell, et al,* 60 Miss. 164, in which there was *obiter dictum* possibly in conflict with *Mitchell*

v. Transit, supra. Based solely on that old case, Judge Griffith, in his work on Mississippi Chancery Practice, seems to accord to the defendant in a chancery case a course of action partially similar to that following by Respondents in this case (Griffith's Mississippi Chancery Practice, Paragraphs 538 and 562). If *Baird v. Bardwell* should be considered in conflict with *Mitchell v. Transit,* it is, of course, overruled by the later case. Certainly Petitioners, faced with the extreme situation outlined above and called upon to decide their course of action, had the perfect right to accept the rule above quoted from a case hardly four years old.

Instead of proceeding to the only final judgment sanctioned by this rule of Mississippi practice—dismissal with prejudice—the chancery court proceeded to admit on this *ex parte* hearing (R. 854-1242) three hundred eighty-eight pages of evidence. This evidence assumed to relate to affirmative defenses and to the so-called cross-bills of Gulf and the Ridgeway group. The trial court further proceeded at one fell swoop to have a hearing on the demurrer to the cross-bill and to overrule it; and, at the same sitting, to hear evidence on the presumed issues of the cross-bill although those issues had not been defined by any answer on the part of Petitioners.

This court is not called upon to pass judgment on the right of the Supreme Court of Mississippi to change rules of procdure whenever it decides to do so. What this court faces is the failure of the trial court and the Mississippi Supreme Court to accord to Petitioners rights

given under rules of practice which are admitted to exist. That is entirely another matter.

V.

In Awarding Judgment Against Petitioners on the Cross-Bill of the Ridgways.

The Supreme Court of Mississippi affirmed the judgment of the trial court solely on the basis of the cross-bills of "Gulf Refining Company and some twenty-five other defendants". The twenty-five other defendants referred to in the opinion are the Ridgway group, whose answer begins on Page 452 of the Record (Appendix 28). The Supreme Court of Mississippi manifestly considered this so-called cross-bill of these twenty-five parties quite important, reference being made to it at a number of places in the opinion:

> "The twenty-five other defendants who made their answers cross-bills, in addition to setting up their particular interest in the premises, adopted all the denials and averments of the answer of the Gulf Refining Company and likewise, and as stated, made their answers cross-bills. * * *
>
> "Had there been no cross-bills, it may have been that the complainants would have had the right to dismiss * * *
>
> "We are of the opinion, therefore, that the court was correct in not dismissing the cross-bills, and in proceeding to a final hearing on them * * *
>
> "Under the cross-bills every issue and question * * * were adjudicated * * *"

The fact, is that this so-called cross-bill was an utter nullity and could not form the basis of any action or judgment by the court. Besides being subject to most of the infirmities hereafter discussed with respect to Gulf's cross-bill, the Ridgeway cross-bill was entitled to no consideration at all because it was never served. Section 1296 of the Mississippi Code of 1942 (Appendix 4) is the Mississippi statute dealing with cross-bills, and their service:

> "A defendant in a chancery suit may make his answer a cross-bill against the complainant, or his co-defendant or defendants, or all of them * * * and may require the same to be answered; * * * and he shall have process thereon against the defendants to such cross-bill, and the like proceedings thereon as in other bills or cross-bills; but five days' notice, in writing, to the solicitor of the complainant in the original bill shall be sufficient to require the complainant to appear to such cross-bill, and to answer the same within said time * * *"

No process was issued or served in connection with the Ridgeway cross-bill, no notice in writing to solicitors for Petitioners was given, no answer or other pleading was filed to the cross-bill, and not the slightest notice was paid to it by Petitioners. In fact, the pleading itself bore the heading of "Answer" only, and did not call itself a cross-bill. If authority were needed for the proposition that this cross-bill could furnish the basis for no judgment against Petitioners, it would be found in the late case of *Majure v. Johnson, et al*, 192 Miss. 810, 7 So. (2d) 545.

The cases from this court are, of course, all one way on the proposition that a judgment may not be taken against a party without notice to him and without the opportunity to defend.

Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791;
Brinkerhoff, etc. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107;
American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231;
Chase National Bank v. Norwalk, 291 U. S. 431, 78 L. Ed. 894.

This Court need go no further than this point, we submit, to determine that the decision in this case should be reviewed and reversed. A reading of the opinion of the Supreme Court of Mississippi will show constant reference to this Ridgeway cross-bill as the basis for its holding. That it could furnish no such basis in the absence of process or notice of any kind, is too elementary for argument.

VI.

In Proceeding to Judgment on Gulf's Cross-Bill Without Giving Petitioners the Opportunity to Answer and Defend it After the Demurrer to the Cross-Bill Was Overruled and When Petitioners Had Settled With Gulf.

The argument under this point does not deal with the question of the propriety of overruling the demurrer to the cross-bill or the question of whether the dismissal of the original bill would carry Gulf's cross-bill

with it. Those points will be presented *infra*. We deal here with Gulf's cross-bill on the assumption that the demurrer was properly overruled.

There is no question that Gulf's cross-bill was properly served under Mississippi statutes. As heretofore shown, Petitioners waived the service of Gulf's cross-bill, and asked and obtained time to answer and file their demurrer to the cross-bill. The point here made is that the action of the Mississippi State Court on the cross-bill after overruling the demurrer did not square with accepted Mississippi practice or with the constitutional requirements of due process of law.

A comprehensive scheme of chancery practice was enacted by the Legislature of Mississippi as Chapter 151 of the General Laws of 1924. The various provisions of that Chapter are now carried as sections in the Mississippi Code of 1942, and reference will be made to the Code sections though the scheme provided can best be understood by examining said Chapter 151. It is contended that under that scheme of chancery practice it was not permissible that a judgment be entered in favor of Gulf Refining Company and against Petitioners without giving Petitioners the opportunity to answer and defend the cross-bill.

1. Section 1296 of the Mississippi Code (Appendix 4) provides that cross-bills shall be dealt with as other bills. And Section 1289 of the Mississippi Code (Appendix 3)

deals with procedure to be followed upon the overruling of a demurrer. Therein it is provided:

> "It shall be the duty of the chancellor to act on said demurrer promptly and in his decree he will fix a reasonable time to amend or answer * * *"

Under the heading "Requirements Respecting Answer When Demurrer is Overruled", Judge Griffith, in Paragraph 310 of his book, refers to that Section and reiterates the rule as follows:

> "If the demurrer be overruled the court will require that in a reasonable time all the circumstances considered, the defendant shall file his answer * * *"

The Mississippi rule is in accord with the general rule as set forth in *19 American Jurisprudence, Equity*, Paragraph 318, Page 227:

> "According to the general rule, a decree should not be entered directly on the overruling of a demurrer to a bill, but the defendant should be ordered to answer the bill * * *. In default of such answer a pro confesso decree will be taken, and the cause will be proceeded with ex parte. The bill may not be taken or confessed until opportunity has been given to the defendant to answer, inasmuch as the rule is that upon an order overruling such a demurrer, the defendant is entitled to an opportunity to answer the bill. The permission to answer such bill must be given, notwithstanding the time which is prescribed by statute within which, unless for good cause shown, the defendant may and shall file an answer has expired."

The protection afforded by this salutary rule is strengthened by the Mississippi Statutes prescribing the duties of the clerk of court in setting down the cases for hearing at a term of court. Section 1240 of the Mississippi Code requires the clerk to keep an issue docket, and Section 1241 requires that the clerk enter, without request, on that issue docket causes which are at issue. But he cannot place on the issue docket any cause pending on demurrer. Section 1244 provides for the entry of those causes on an entirely different docket:

> "Motion Docket and Entries.—The clerk shall also keep a motion docket in which he shall, in the order in which they are filed, docket as of course and without request, all demurrers * * *"

The only way the cross-bill of Gulf could have gotten onto the issue docket for trial at all would have been under Section 1286 of the Mississippi Code, which provides for decrees *pro confesso* after the taking of which the clerk is required to set the cause down on the issue docket (Appendix 2).

None of the requirements of this statutory scheme were observed by Gulf or enforced by the court in acting on the cross-bill. The final decree (R. 749-A, et seq., Appendix 76, et seq.) shows that the court below proceeded to do at one continuous hearing the following things in the order named: Affirmed its ruling in refusing to allow Petitioners to dismiss without prejudice, dismissed the original bill and amendments with prejudice, overruled the demurrer of Petitioners to Gulf's cross-bill, and granted the prayer of the cross-bill as

against Petitioners. This proceeding does violence to the Statutes of Mississippi as well as to every conception of due process as set forth in the decisions cited in this brief. It may be that the trial court could have fixed a very short time in which Petitioners would have been required to answer after their demurrer was overruled; but the court could not brush aside entirely the requirement that some interval of time be given for answer.

The presumption is that Petitioners would have answered the cross-bill because they were litigating every single issue the cross-bill could possibly have raised. Gulf had ample protection under the Statutes of Mississippi, and could even attach the person of Petitioners instead of taking decree *pro confesso* against them—Sections 1297-8 Mississippi Code of 1942 (Appendix 4.)

If Petitioners had filed an answer one line long to the cross-bill the case would not have been triable at the term under Section 1310 of the Mississippi Code of 1942 (Appendix 5) reading in part as follows:

> "Cause Triable When.—After the expiration of thirty days from the due date of the answer or answers the cause shall be deemed as triable, and the clerk will thereupon, without request, set the same down on the proper docket for hearing * * *."

Traditionally, no proof could be taken on any matter not made an issue by the bill and answer, and the complainant had available to him a process of attachment against the person and distraint against the property of the defendant for the purpose of compelling an answer

upon which issues could be claimed. This practice is preserved in Mississippi under Section 1297, Mississippi Code of 1942 (Appendix 4). The development of the decree *pro confesso* to overcome the disadvantages of this system is outlined in the early opinions of the Supreme Court in *Thomas v. Worcester,* 114 U. S. 104, 29 L. Ed. 105, and cases cited; and in *Hovey v. Elliott,* 167 U. S. 409, 418, 42 L. Ed. 215.

Even if the procedure which the trial court followed had conformed to the requirements of Mississippi practice, the course of the decisions of this Court demonstrate its disposition to pass "judgment upon the whole course of proceeding to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples * * * " —*Malinsky v. People,* 321 U. S. 401, 89 L. Ed. 1029. Nor will this Court be deterred from a full and unfettered examination of the facts attending the procedural steps by which this judgment is affirmed because of any argument which may be made to the effect that the decision of a state court concerning a matter of state practice is entitled to weight. Cf. *Titus v. Wallick,* 306 U. S. 282, 83 L. Ed. 653. The case now before this Court stands on facts which are entirely undisputed and in such a case this Court reaches its own decision as to the legal effect of those facts uninfluenced by anything that the state court may have decided or failed to decide:

> "In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted Federal right

cr immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the Federal right or immunity, as applied, we are free to re-examine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained."

Hooven, etc. Co. v. Evatt, 324 U. S. 652, 89 L. Ed. 1252.

Indeed it cannot possibly be conceived that the decision of this case could rest on adequate independent non-Federal grounds. Every step taken in the case is challenged on the ground that it did not afford due process of law or the equal protection of the laws. In such a case this court will review the decision of the State Court even though it seems to rest entirely on local law.

Schuylkill Co. v. Commonwealth of Pennsylvania, 296 U. S. 113, 80 L. Ed. 91;

Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. Ed. 1102;

Ancient, etc., Order v. Michaux, 279 U. S. 737, 73 L. Ed. 931;

Southern Pacific Co. v. State, ex rel, 325 U. S. 761, 89 L. Ed. 1915;

United States Gas, etc. Co. v. Texas, 303 U. S. 123, 82 L. Ed. 702;

Chicago, etc., Co. v. Rambo, 298 U. S. 99, 80 L. Ed. 1066;

Williams v. State of North Carolina, 325 U. S. 226, 89 L. Ed. 1577;

Adam v. Saenger, 303 U. S. 59, 82 L. Ed. 649;

International Harvester Co. v. Wisconsinn, 322 U. S. 435, 88 L. Ed. 1373.

2. *Gulf did not resist Petitioner's motion to dismiss.* When Petitioners filed their motion in the chancery court to dismiss without prejudice (R. 605, Appendix 30) the various parties filed written objections to such dismissal aggregating more than one hundred pages (R. 606-708), but Gulf did not file any objection to the non-suit. The point is made that Judge Griffith says in his book that no written response to a motion is necessary—though no case is cited for such a rule. But Gulf had already set its own standard of procedure in this case by filing an elaborate answer (R. 524-529) to a similiar motion which had been litigated between Gulf and Petitioners. It is incomprehensible that Gulf would file its written defense to that motion it objected to and then withhold the filing of a written objection to the granting of a motion far more important than the one so defended by it. The plain fact is that Gulf knew it had settled with Petitioners and did not demonstrate any interest in what happened in the lawsuit then pending.

As confirmatory of this attitude of non-belligerence on the part of Gulf, it will be noted that more than one hundred pages of evidence was introduced on the hearing of the motion to dismiss (R. 753-851); and although the attorneys for Gulf were present, they did not participate in the hearing on the motion or offer the slightest objection to its being granted.

Gulf did not get into the fight until after Petitioners had filed their written objection to a trial in response to the chancellor's letter and all of the rights of the parties had been pegged by that letter and the objection had

been presented, and Petitioners were in the act of leaving the courtroom. Thereupon one of the attorneys for Gulf arose and expressed the idea that the chancery court had exclusive jurisdiction (R. 856-7, Appendix 72-3) to adjudicate the case and adverted to the fact that Gulf had interposed a cross-bill. This Court has been at pains to express its condemnation of reliance on such informal notice—*Chase National Bank v. Norwalk*, 291 U. S. 431, 78 L. Ed. 894. Gulf will not be heard to press its cross-bill under such a course of conduct calculated so completed to lull Petitioners into the conviction that Gulf was not further pursuing the litigation.

3. *The cross-bill of Gulf did not present an accurate picture of the situation at that time.* A year and a half before the cross-bill was presented to the trial court Gulf had settled with Petitioners by negotiating and accepting a lease in which Petitioners had granted to Gulf everything Gulf was claiming from the other fee claimants (R. 755, et seq., Appendix 41 et seq.). If it be contended that Gulf had, in this lease, reserved the right to continue this litgation, Petitioners had, in the Federal Court, filed an action to reform that portion of the lease and Gulf knew that (R. 732 et seq.).

At all events and from any angle, this settlement between Petitioners and Gulf had an important bearing on the issues Gulf sought to raise against Petitioners in its cross-bill. Despite the lapse of a year and a half, Gulf had never amended its cross-bill to show this settlement, and it did not amend its cross-bill when it sought to make it the basis of a decree against Petitioners. In pro-

ceeding to judgment *ex parte* Gulf failed entirely to amend its cross-bill to conform to the situation then known to it, and the decree thus obtained on the cross-bill lacks the qualities which will make it square with due process of law.

These facts emphasize the wrong done Petitioners in failing to give them time in which to answer Gulf's cross-bill. It is certain that Petitioners would have brought the fact of this settlement before the court. The whole proceeding in connection with the cross-bill comes within the definite condemnation of the decision of this court in *American Surety Co. v. Baldwin*, 287 U. S. 156, 77 L. Ed. 231, wherein the court, through Mr. Justice Brandeis, said: "Due process requires that there be an opportunity to present every available defense."

VII.

In Awarding Judgment Against Petitioners and in Favor of Gulf Refining Company in a Case Not Justiciable Because it Had Become Moot.

Gulf, of course, claimed no interest in the land involved in this suit nor in any royalty. It claimed only an operating lease from the Lewises, the Newells, the Jones, the Windhams, the Betheas, fee claimants. Petitioners brought this suit against Gulf to cancel those leases. Gulf's cross-bill asked only that those leases be confirmed.

While that controversy was pending Petitioners and Gulf reached a settlement. By that settlement Petition-

ers conveyed to Gulf the identical leasehold interest under identical terms as those it claimed under the leases from Lewis, et al. Upon the acceptance of that conveyance Gulf therefore became the owner of everything which was in litigation between Gulf and Petitioners. Gulf of course endeavored to retain some fancied right to continue the pending litigation. The Court will not lose sight of the fact that Petitioners have an action pending in the Federal Court seeking to reform that portion of the lease (R. 732, et seq.). Aside from that, however, and regardless of however strong the desire might be on the part of Gulf to continue the fight, there was nothing left to fight about. Gulf had bought both sides of the lawsuit. In such circumstances it was the duty of the chancery court to refuse to hear Gulf's cross-bill because nothing of value was involved. This court has said that several times.

Gulf is in exactly the same position as complainants were in *American Wood Paper Co. v. Heft,* 8 Wall. 333, 19 L. Ed. 379. Complainants had brought suit to enjoin defendants from infringing the patent claimed by complainants. During the course of the litigation complainants bought the patents on which defendants were relying, but complainants attempted to carry on the litigation. This Court used this language in refusing to hear the case:

> "The case, as it now stands, is: the complainants having purchased in the patents under which the suit was defended, owns both sides of the subject matter of the litigation; * * * for this reason, the case should not be heard by this court."

The gist of that holding is thus expressed in the syllabus:

> "Where the complainants own both sides of the litigation and control them, the case should not be heard by this court. The litigation is no longer a real one."

The holding was similar in *South Spring, etc., Co. v. Amador, etc. Co.*, 145 U. S. 300, 36 L. Ed. 712. The suit was between two corporations and before it was submitted the control of both had come into the hands of the same persons, although there were still minority stockholders. Here is what this Court said in declining to entertain the litigation:

> "We cannot, however, consent to determine a controversy in which the plaintiff in error has become the *dominus litis* on both sides. * * * The litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one."

The following cases are to the same effect:

Dakota County v. Glidden, 113 U. S. 222, 28 L. Ed. 981;
California v. San Pahlo, etc. Co., 149 U. S. 308, 37 L. Ed. 747;
Mills v. Green, 159 U. S. 651, 40 L. Ed. 293.
Natural Milk Products Association v. San Francisco, 317 U. S. 423, 87 L. Ed. 375;
C. I. O. v. McAdory, 325 U. S. 472, 89 L. Ed. 1741.

VIII.

In Awarding Judgment Against Petitioners on Cross-Bills Which on Their Face Showed No Right to Relief and to Which a Demurrer Had Been Interposed; Especially After the Original Bill Has Been Dismissed.

The argument here will be confined to Gulf's cross-bill. The Ridgeway cross-bill is out of the case because it was not served and at most it merely adopted Gulf's cross-bill.

The point is made that Gulf's cross-bill, on its face, did not entitle Gulf to any relief because the matters there pleaded were purely defensive. The demurrer which was interposed challenged Gulf's cross-bill on that ground and the demurrer should have been sustained. When Petitioners declined to proceed further they had the right to assume that no judgment would be awarded against them on a cross-bill which did not state a cause of action and to which their demurrer was pending. To award a judgment against them under those circumstances, taken in connection with those above outlined, would be to take their property without due process of law.

The excerpts from the original bill set forth in our Appendix (Pages 8 to 14) will show that Petitioners ask against Gulf only the cancellation of the leases Gulf claimed, together with relief incident thereto. Gulf's answer (R. 271, et seq., Appendix 17, et seq.) admitted the taking of the leases and that it was claiming title under those leases.

The bill prayed one thing, and one thing only—the cancellation of Gulf's four operating leases (R. 67-8, Appendix 13-14). The bill offered to do full equity by repaying Gulf all of its expenses in connection with any oil operations, and asked an accounting to determine how much complainants owed Gulf (R. 65, et seq., Appendix 12). Every single averment of Gulf's answer was addressed to that one prayer for relief, and all of the defenses set up by Gulf were urged to combat that prayer of relief.

Gulf's prayer for relief in its cross-bill (R. 300, Appendix 24) was that those four leases be confirmed. The entire battle ground had to do with those four leases: Petitioners asked their cancellation, Gulf asked their confirmation. If on a trial the Court should refuse cancellation, the result would be confirmation.

Petitioners promptly acknowledge service of Gulf's cross-bill (R. 300, Appendix 24) and promptly filed their demurrer (R. 398-400, Appendix 25). The demurrer was very full and constituted, in fact, a good brief on the subject. The final decree overruled this demurrer (R. 798-A, Appendix 76) and granted to Gulf the only relief sought by it in the cross-bill, "That the leases * * * as listed in its original answer and cross-bill * * * are hereby adjudged and decreed to be good and valid". The law in Mississippi, as elsewhere, is that a cross-bill which does not ask any relief except such as would be given upon the denial of the prayer of the original bill is not a good cross-bill, and is demurrable. The rule in Missis-

sippi is thus epitomized by Griffith's Mississippi Chancery Practice, Paragraph 379:

> "* * * If a cross-bill presents no ground for affirmative relief and sets up a claim purely defensive, and which therefore could be fully asserted in the answer, it is not a cross-bill and is demurrable as such."

Judge Griffith cites three Mississippi cases as the basis for this text:

> *Buckingham v. Wesson, (1877) 54 Miss. 526;*
> *Vaughan v. Hudson, (1882) 59 Miss. 421;*
> *Carter v. Harvey, (1890) 7 So. 286.*

Everyone of those cases holds exactly the rule we are contending for. The first syllabus of the Buckingham case will illustrate this:

> "Cross-bill. Its office. Defensive Matter. A cross-bill which presents no ground for relief, but sets up a claim purely defensive fully asserted in the answer, is demurrable."

In a case arising in Mississippi and applying the law of the State the Circuit Court of Appeals for the Fifth Circuit reached the identical conclusion in a case on all-fours with the one at bar—*Hinds, et al v. Martin* (C. C. A. 5, 1923) 286 Fed. 623. Martin filed his suit in the state court against Hinds and others to quiet title to certain timber lands in Mississippi. Hinds and others removed the case to the Federal Court and filed their answers claiming record title and claiming, as here, title by adverse possession. Later by amendment defendants

prayed that they, "Be decreed to be the sole, legal, and equitable owners of the land described therein". The Circuit Court of Appeals rejected the contention that this prayer would be sufficient to constitute a cross-bill holding that this was not a prayer for affirmative relief:

> "We do not think that the proposed amendment to the answer would have made it the equivalent of a cross-bill. The only prayer is that the bill of complaint against them be dismissed, and that they, the said defendants, be decreed to be the sole, legal and equitable owners of the land described therein. This would have been the legal consequence of a decree dismissing the bill upon the merits, and such a decree thereafter could have been pleaded as establishing the title of defendants over the plaintiff in any subsequent litigation respecting said land, as fully as a decree expressly stating that defendants were the legal and equitable owners.
>
> "A cross-bill seeking no discovery and setting up no defense which might not as well have been taken by the answer will be dismissed, with costs."

That language fits the situation here perfectly. It forms the basis *inter alia* for the general rule as set forth in 30 Corpus Juris Secundum, Page 788:

> "A cross-bill will not be entertained where the party filing it can obtain full relief in the process of adjudicating the issues tendered by the original bill. So, where a defendant can obtain, under the original bill and his answer thereto, all the relief or objects which he seeks, or to which he is entitled, a cross-bill is unnecessary and will not be permitted, and if filed it will be dismissed * * *."

See also to the same effect:

Ayres v. Carver, 58 U. S. 591, 15 L. Ed. 179;
Providence, etc. Co. v. Goodyear, 76 U. S. 807, 19 L. Ed. 587;
Ayres v. Chicago, 101 U. S. 184, 25 L. Ed. 838;
Miller, et al v. Ricky, 218 U. S. 258, 54 L. Ed. 1032;
Moore v. New York, etc., Exchange, 270 U. S. 593, 70 L. Ed. 750.

The Supreme Court of Mississippi affirmed the judgment of the lower court on the basis of the assumption that the original bill and amendments had been dismissed and that the cross-bills survived the dismissal and were adequate bases for relief. The opinion of the court itself, we submit, shows that the action of the Supreme Court is entirely without legal justification. The opinion is based entirely on the portion of Judge Griffith's work on Chancery Practice quoted therein (Appendix 84) which, after conceding that ordinarily the dismissal of the original bill carries with it the cross-bill, holds that the cross-bill will be retained if it

> "* * * seeks affirmative relief separately and independently of the original bill * * * and its facts be complete enough within themselves and without the aid of the original bill to make the granting of relief thereon practicable and proper."

Judge Griffith cites seven cases as authority for this proposition, all, of course, decisions of the Supreme Court of Mississippi: *Ladner v. Ogden,* (1856) 31 Miss. 332; *Gilmore v. Felhour,* (1871) 45 Miss. 627; *Thomason v. Neely,* (1874) 50 Miss. 310; *Belcher v. Wilkerson,* (1877) 54 Miss.

677; *Jacks v. Bridwell,* (1876) 51 Miss. 881; *DeWeese v. DeWeese, (1877)* 55 Miss. 315; *Sigman v. Lundy,* (1889) 66 Miss. 522, 6 So. 245. A detailed analysis of those cases is not necessary but a sufficient look at them should be taken to test the circumstances under which the Supreme Court of Mississippi has applied the rule.

In *Ladner v. Ogden* the cross-bill involved asked far more than the cross-bill here. The Mississippi Court held, however, that it did not ask independent relief and that it must fall upon the dismissal of the original bill. Here is a part of the language used:

> "When a cross-bill is filed for relief, separate and independent of the original bill * * * the dismissal of the original bill would not necessarily dismiss the cross-bill * * * but when it has direct reference to the relief sought in the original bill, and is rendered necessary by reason of the original bill involving some collateral right, affected by the relief sought in the original bill, it is to be considered as in the nature of a defense to the original bill; and when the claim therein asserted has been abandoned by the dismissal of the bill, the cross-bill would fall with it."

In *Gilmer v. Felhour* and *Thomason v. Neely,* the Mississippi Court held that the cross-bills went out with the original bill and furnish no particular help here, and the same is true of *Jacks v. Bridwell.*

Belcher v. Wilkerson presented facts very much like those involved here. Belcher filed his original bill to confirm a tax title, and in due time Wilkerson, as executor for one Freeman, was admitted as a party and permitted

to file his answer. He made his answer a cross-bill setting up that the tax title of Belcher was invalid and asking for possession of the land and an account of rents and profits. A year later Belcher paid the costs and dismissed his bill. Thereupon Wilkerson, showing service on his cross-bill on Belcher, set the case for final hearing on his cross-bill and obtained a final decree just as Gulf has sought to do here. The Supreme Court of Mississippi held that Wilkerson was properly in court and that the cross-bill was properly filed, but held also that Belcher had a right to dismiss his suit without prejudice and that the dismissal carried with it the cross-bill. Here is some of the language used:

> "As the decree was not final, and the cause was to be heard anew on its merits, as to the applicant for a hearing anew, it was a pending suit, and subject to the right of complainant in the original bill to dismiss it, as he might have done if a decree had not been made. The dismissal of the original bill carried with it the cross-bill."

DeWeese v. DeWeese, supra, represents the first instance where the Supreme Court of Mississippi held a cross-bill after the dismissal of the original bill and illustrates clearly what is meant by relief which is separate and independent. DeWeese sued his wife for divorce alleging desertion, and she answered denying the desertion and asserting her willingness to come back to him at any time. She made her answer a cross-bill for separate maintenance but did not ask a divorce. What she asked, therefore, was not a defense against the divorce asked by her husband, but was separate and independent relief although growing out of the matter included in the original bill.

After the proof was all in showing definitely the falsity of the husband's charges of desertion, the husband dismissed his bill without prejudice, and the court promptly allowed the dismissal. Upon the insistence of the wife, however, the court retained the cross-bill and granted relief on it, holding that the object of the husband in dismissing his bill was to delay the wife in getting the support to which she was entitled, and further that if the cross-bill were not retained, "very great suffering and privation" would be imposed on the wife. In affirming the action of the chancellor in that case the Supreme Court of Mississippi spoke in part as follows:

> "The general equity rule is that the dismissal of the original bill carries with it the cross-bill; but * * * this result will not necessarily follow where the cross-bill is filed for relief separate and independent of the original bill, though touching the same property or growing out of the same subject matter involved in the original bill * * *.
>
> "While it may be often difficult to apply accurately the rule laid down by this court in Ladner v. Ogden, supra * * * we think the case at bar falls fairly within it. The relief prayed by the wift, to-wit, support as wife, was wholly independent of the divorce asked by the husband. Having driven her from home, he was bound to accord it to her, whether she sought a divorce from him or resisted one sought by him * * *.
>
> "For these reasons, when the proof taken had established the truth of her statements, and the falsity of his, the chancellor properly, we think, retained the cross-bill, after the complainant had dismissed the original bill, in order that he might afford her this

> independent relief to which, in any event she was entitled * * *."

There is a clear illustration of what the courts mean by relief which is independent and separate though growing out of the subject matter of the suit. The wife could have maintained a bill for separate maintenance based, not on the dissolution of the marriage, but the perpetuation of it. When she denied her husband's charge of desertion she had completed the defense she offered to his suit for divorce. The claim she set up for separate maintenance, based as it was on the perpetuation of the marriage relationship, was not defensive at all to her husband's suit. It was independent and separate. That question could be raised only by a cross-bill.

The case of *Sigman v. Lundy, supra,* illustrates the definite limitations which the courts of Mississippi throw around the retention of a cross-bill. It is interesting in that the cross-bill in that case was retained only as an original bill and the defendant who filed the cross-bill was required to serve a regular summons on the cross-defendant and to proceed with the case just as if the cross-bill were an original bill.

Sigman brought his suit to confirm title against the Lundys, who were minors, and others and defendants answered and made their answer a cross-bill asking that certain written instruments not mentioned in the original bill be cancelled. Sigman dismissed his original bill in vacation and at the ensuing term of court the chancellor "made an order approving the dismissal"; the chancellor

retained the cross-bill, but retained it only as an original bill and ordered process to be issued on it as on an original bill. The defendants to that cross-bill did not demur, but entered their appearance and tried the case on the merits. The Supreme Court approved that as proper procedure in Mississippi, using in part this language:

> "It will be noted that the suit was proceeded with upon the cross-bill, as an original bill, and the appellees, the parties defendant, who exhibited the cross-bill, are designated as complainants throughout the opinion * * *.
>
> "The chancellor did not err in retaining the cross-bill and permitting complainants therein to proceed with it as an original bill. In Belcher v. Wilkerson, 54 Miss. 677, there was no order of court retaining the cross-bill, while in the case now before us the order of the chancellor expressly retained the cross-bill as an original bill and directed process to be issued on it as such. The appellant entered her appearance and answered, thus waiving the process directed to be issued."

Sigman v. Lundy is the only case Petitioners had to guide them as to Mississippi procedure when they declined to proceed further and left the courtroom. Assuming that they had to shoulder the responsibility of taking the chance that the Supreme Court of Mississippi would change the rule of *Sigman v. Lundy*, they did not have to take the responsibility of assuming that the court would not grant them the protection of that rule if it remained unchanged—and there is, of course, no claim that this rule has been changed. If Petitioners had been

dealt with according to the pattern of *Sigman v. Lundy*, the trial court would have dealt with them as follows:

First, Petitioners' motion to dismiss without prejudice would have been sustained; second, the cross-bill of Gulf (assuming for the moment that it was sufficient by itself) would have been retained as an original bill and summons thereon would have been issued returnable to the next term of court and would have been served on Petitioners; finally, trial would have been held on the cross-bill of Gulf as an original bill. The failure of the Mississippi Courts to follow rules of practice concededly in force at the time under the circumstances here set forth constitutes a clear denial to Petitioners of due process of law.

The decision of the Supreme Court of Mississippi in this case uses the language: "Particularly in this State", but the Mississippi rule is not different from the universal rule as recognized by this Court. It is sufficient to cite two or three cases so holding:

Dows v. The City of Chicago, 11 Wall. 108, 20 L. Ed. 65;
Holgate v. Eaton, 116 U. S. 33, 29 L. Ed. 538;
California, etc. Co. v. United States, 192 U. S. 355, 48 L. Ed. 476.

The decision of the Mississippi Supreme Court (Appendix 82) approves further the language of Section 384 of *Griffith's Mississippi Chancery Practice* in which it is held that the cross-bill, to furnish the basis of relief must be

complete without aid of the original bill, the exact language being:

> "• • • if the cross-bill and its facts be complete enough within themselves, and without the aid of the original bill to make the granting of relief thereon practicable and proper."

The requirements of a cross-bill generally are set forth in Judge Griffith's book, Paragraph 380, in part as follows:

> "The material facts of the cause of cross-suit shall be averred in the cross-bill in ordinary and concise language, with the same particularity, and with the same care and regard to the same substantitive and procedural requirements as control in an original bill, and must be as complete; and it must contain a prayer for relief, the rules in that respect being the same as apply to an original bill."

The Mississippi case cited as authority for the last quoted text is *Eustice v. Holmes*, 52 Miss. 314, and the case amply sustains the text.

Under those authorities, therefore, the cross-bill of Gulf resolved itself into an original bill by Gulf against Petitioners to confirm the leases Gulf had obtained from the Lewises and others, and its sufficiency must be tested under the requirements of "substantive and procedural requirements" applying to original bills. One of these requirements is the Mississippi Statute making it mandatory on a person seeking to quiet his title to deraign title—*Section 1325 Mississippi Code of 1942*, which reads in part as follows:

> "In bills to confirm title to real estate, and to cancel or remove clouds therefrom, the complainant

> must set forth in plain and concise language the deraignment of his title; and a mere statement therein that complainant is the real owner of the land shall be insufficient * * *."

The Supreme Court of Mississippi has rendered a number of opinions applying that statute in all of its rigor and holding pleadings insufficient which do not deraign title:

> *Russell v. Hickory, 116 Miss. 46, 76 So. 825;*
> *Longmeyer v. Mars, 124 Miss. 77, 86 So. 753;*
> *Eastman v. Wyatt Lbr. Co., 102 Miss. 313, 59 So. 93;*
> *Lyon Co. v. Ratliff, 129 Mis. 342, 92 So. 229.*

The opinion of the Supreme Court of Mississippi in this case proceeds on the necessary assumption that the original bill with amendments is entirely out of the case and cannot be considered in testing the adequacy of the cross-bill any more than if it had been completely torn up or had never existed. When this is done it is perfectly plain that the cross- bill, including all of the averments of the answer, of which it is a part, is entirely inadequate. For illustration, the cross-bill does not contain the name of any one of the Petitioners and without the bill it is perfectly impossible to tell who it is that Gulf is suing, and a decree in Gulf's favor could not be rendered because the names of its adversaries nowhere appear.

It is equally plain that there is no deraignment of title, without which the demurrer to the cross-bill ought to have been sustained and without which any decree on the cross-bill would be impossible. The answer of Gulf in many instances (R. 280, et seq.) merely admitted the averments of certain numbered paragraphs of the original

bill. These were the paragraphs setting forth a chain of title through which Mrs. Hudson claimed to have acquired title. With the original bill gone it is impossible to tell what it is Gulf was attempting to admit. Gulf's claim of adverse possession is equally unintelligible from the answer standing alone and without the original bill.

It is clear that the opinion of the Supreme Court of Mississippi in this case does not intend to overrule any of the quoted authorities, and that the requirements of them are still the rule of practice in Mississippi. There being no dispute about what the averments of the bill are and the averments of Gulf's answer and cross-bill, it remains but for this Court to lay those pleadings against the established rule in Mississippi and to hold that the Mississippi Court did not grant to these non-resident Petitioners the protection of the established rules of procedure in Mississippi.

IX.

By the Decision of the Supreme Court of Mississippi on a Point Never Presented To or Passed On by the Lower Court and Which Petitioners Never Had a Chance to Defend.

The cross-bills of Gulf and the Ridgways turned out to be the sole basis for the decision of the Supreme Court of Mississippi. The decision is based, we submit, on the assumption of a state of facts which never existed and which Petitioners were never given the chance to defend. The original bill was never dismissed by the court below,

and the court below was never called upon to rule on the retention of the cross-bill after the dismissal of the original bill. Yet that is what the Supreme Court of Mississippi assumes to have been done in its decision.

Here is the pith of that decision (Appendix 84 and 87):

> "Had there been no cross-bills, it may have been that the complainants would have had the right to dismiss, as they sought to do, but leaving that question aside for the moment, we are of the opinion that they had no right to do so and at the same time secure the dismissals of the cross-bills * * *.
>
> "We are of the opinion, therefore, that the Court was correct in not dismissing the cross-bills, and in proceeding to a final hearing on them * * *.
>
> "This brings us back to the original bill—whether it should have been dismissed, retaining the cross-bills * * *."

It is plain, therefore, that the Supreme Court of Mississppi was dealing with a situation which never existed and was assuming conditions entirely contrary to the fact. In conceding Petitioners' right to dismiss and in holding that such a dismissal would not carry with it the cross-bills, the Supreme Court of Mississippi was reaching entirely into the realm of facy, and the conclusion "that the court was correct in not dismissing the cross-bills" is wrong because the premises on which it is based were non-existent.

When the chancellor invited Petitioners to the special term of court and assured them of protection from the

threats recognized in his letter he said, in effect, to Petitioners:

> "You are admonished to come into court and try your case based on your original bill with amendments and the answers of the one hundred six defendants and all other pleadings which may properly come before the court."

That is the situation Petitioners were called upon to face. That is the situation which existed when they presented their written objection to a hearing. That is the situation on which they must stand or fall.

That is not the situation which the Supreme Court of Mississippi assumes to adjudicate. Its decision is based on the assumption that the chancellor, when he issued his invitation, said to Petitioners somethink like this:

> "Your original bill, with amendments, has now been dismissed without prejudice but this does not carry with it the cross-bills of Gulf and the Ridgways. You are admonished to come into court and defend these cross-bills."

That situation would have been entirely different. The issues of these cross-bills were quite restricted, and Petitioners had settled with Gulf—and does anyone now have the hardihood to contend that the Ridways' cross-bill is entitled to consideration?

At all events, the record does not reflect the slightest hint that the threats, the basic impediment to a trial, had emanated from Gulf or the Ridgways. It is entirely pos-

sible that Petitioners would have been content to try these restricted issues with this small group of litigants if Petitioners had been given the right to do so. It is perfectly plain that they were not given the right to answer to any such situation, and that Petitioners, if the decision stands, are to be stripped of their very valuable property rights on the basis of a situation they were never called upon to face. Mr. Justice Holmes many years ago placed the condemnation of this court on such an effort—*Davis v. Wechsler,* 263 U. S. 22, 68 L. Ed. 143 (cf. *Angel v. Bullington, supra*).

> "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * *
>
> "If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even up local ground * * *. This is familiar as to the substantive law, and for the same reason it is necessary to see that local practice shall not be allowed to put unreasonable obstacels in the way * * *."

The granting of writ of certiorari in that case to the state court of Missouri and its subsequent reversal by this Court point the way clearly to a similar course here. The cases cited by Mr. Justice Holmes in that opinion, and the subsequent citations of *Davis v. Wechsler,* furnish an unanswerable brief on the point now under consideration.

A few years before that Mr. Justice Holmes had laid down the principle that the Fourteenth Amendment protects a litigant against the decision by a state court on a question he has not been called upon to defend or as to any matter concerning which he has not had a chance to put in his evidence—*Saunders v. Shaw*, 244 U. S. 317, 61 L. Ed. 1163. In that case this Court had before it the propriety of the exclusion of certain testimony at the trial in the Supreme Court of Louisiana. This Court held that the failure of the Louisiana Courts to permit the intervening defendant to offer his evidence was a denial of due process of law, and that the litigant was not bound to contemplate a decision which was reached unexpectedly and before he had any opportunity to be heard. Here is what the Court said on the subject:

> "He now brings this writ of error and says that he has been deprived of due process of law, contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with this view * * *.
>
> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State

> granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation * * *."

It is well to note, also, the language of Mr. Justice Holmes in commenting on the apparent assumption by the Supreme Court of Louisiana that it would do no good to give the complaining litigant an opportunity to introduce his evidence because under a decision rendered by this Court the previous year (*Myles Salt Co. v. Iberia, etc., District*, 239 U. S. 478, 60 L. Ed. 392) the facts were so clear that the evidence, when introduced, could not possibly affect the result:

> "It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

The language used a short time before that by Mr. Justice Pitney is equally applicable, passing as he was upon the contention that a litigant who has informal

notice of a proceeding is bound by its results—*Coe v. Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027:

> "But, it is said, plaintiff in error is not within that class; he in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for a hearing in the present proceeding as to all questions upon which the liability depended. The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have lead to the same result because he had no adequate defense upon the merits * * *.
>
> "And the effect of the decision under review was to convert his petition, which simply raised an issue of law under the state constitution and the Fourteenth Amendment, into a tender of an issue of fact * * * and then to hold him concluded upon the latter issue for failure to introduce evidence bearing upon it. In doing this, the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice * * *."

And this Court recently granted certiorari to a Circuit Court of Appeals on the ground that the Circuit Court of Appeals "had decided the merits on facts not contained in the record and on a theory which had never been tried

by the litigants", but later found that there was no merit in the asserted grounds—*Helis v. Ward,* 308 U. S. 365, 84 L. Ed. 327. See also the following cases recognizing the same principle: *Brickerhoff Co. v. Hill,* 281 U. S. 673, 74 L. Ed. 1107; *Mooney v. Holohan, supra; Roller v. Holly,* 176 U. S. 520, 44 L. Ed. 520; *American Surety Co. v. Baldwin,* 287 U. S. 156, 77 L. Ed. 231; *Georgia Railway, etc., Co. v. City of Decatur,* 295 U. S. 165, 79 L. Ed. 1365, and the authorities cited in connection with the next succeeding point.

Under these decisions it is manifest, we submit, that the holding of the Supreme Court of Mississippi that the rights of Petitioners are to be foreclosed on the hypothesis that they ought to have litigated with Gulf and the Ridgways on their cross-bills after the original bill and all answers had been dismissed, is a clear denial of the rights of Petitioners under the Fourteenth Amendment. Their valuable property rights are thus cut off because of their alleged failure to do something they never had a chance to do. They were invited into court to face one situation and held in default for not facing another situation with which they were not presented.

Nor can it be contended that Petitioners did not seasonably raise this point. The first time the point was ever brought into the case was when the Supreme Court rendered its decision. Petitioners immediately made the point in their suggestion of error that this was a new question and one which had not been litigated between the parties, and cited the foregoing cases of this Court as authority

for their contention that such a course violated their Constitutional rights. (R. 1301, 1313 et seq.)

X.

By the Decision of the Supreme Court of Mississippi Affirming a Judgment Against Petitioners on the Cross-Bills of Gulf Refining Company and the Ridgways Holding Said Judgment to be Res Judicata as Between Petitioners and Defendants Not Parties to Said Cross-Bills and as to Issues Not Involved in Said Cross-Bills, and When This Point Was Not Involved in the Decision of the Lower Court or Argued Before Said Supreme Court.

Here again is the decision by the appellate court on a point not presented to or decided by the lower court or argued before the Supreme Court. We pass up the question of whether Gulf or the Ridgways made the contention before the Supreme Court. It is perfectly obvious that the remaining parties to the suit—nearly one hundred in number—could not, and did not, raise the point in the lower court or the Supreme Court. This entire notion originated in the mind of the Supreme Court of Mississippi and it is subject to all of the criticism contained in the argument of the point just preceding.

In addition to that, we submit that it is not true that the decision of the cross-bills of the Ridgways and Gulf on their merits would be *res judicata* of other issues involving other parties. When such a holding is attacked on the ground that it offends against the rights of a litigant claimed under the Fourteenth Amendment, this

Court decides for itself who is bound by a judgment under the doctrines of *res judicata:*

Hansberry v. Lee, 311 U. S. 32, 85 L. Ed. 22;
Riley, et al., v. New York Trust Co., 315 U. S. 343, 86 L. Ed. 885;
Postal, etc., Co. v. Newport, 247 U. S. 464, 62 L. Ed. 1215;
Chase National Bank v. Norwalk, 291 U. S. 431, 78 L. Ed. 894.

In *Hansberry v. Lee, supra,* this Court, speaking through Mr. Justice Stone, made it clear that it will examine the question of *res judicata* when a judgment is attached on constitutional grounds:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the constitution of the United States. But when the judgment of a state court * * * is challenged for want of due process it becomes the duty of this court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes * * *."

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in *personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."

That decision reversed on writ of certiorari a decision of the Supreme Court of Illinois in a case resembling this one in many features.

This Court also reversed a decision of the Court of Appeals of Kentucky in which a successor corporation had been held liable under a judgment rendered against its predecessor. *(Postal vs. Newport, supra.)* In that decision this Court stated that it would look into the Constitutional question raised and also would look to see if the decision had sufficient basis to support it. We quote several separated excerpts from the opinion:

> "But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted Federal rights has any support in the record; for if not, it is our duty to review and correct the error * * *."

> "*Res judicata,* like other kinds of estoppel, ordinarily is a matter of state law, and as the decision of of the state court in this case in effect rests upon that ground, this of itself would be sufficient to sustain the judgment against reversal in this court, except for two queries that must first be answered: (a) Is the question of state law, in this case, independent of the Federal questions? and (b) Is the decision reached upon that point sufficiently well founded to furnish adequate support for the judgment."

This Court decided that both questions should be answered by it in a way at variance with the answer given by the State Courts, and its discussion of the matter of privity there is quite illuminating.

Petitioners here promptly challenged the decision of the Supreme Court of Mississippi predicating their challenge on the denial of their rights under the Fourteenth Amendment to the Constitution (R. 1301, 1313 et seq.). The overruling of the suggestion of error amounts to the rejection of this contention even though, as throughout the record, the Supreme Court declined to advert to the Constitutional question.

Reviewing, as it will, the facts of the record entirely undisputed, this Court will, we apprehend, find that the decision of the Supreme Court of Mississippi on this point is wholly lacking in any authority to support it. It will be recalled that the Ridgway group claimed nothing but a royalty interest, and a fractional royalty interest at that, under forty acres out of the three hundred sixty acres involved in the litigation (R. 40-5, 452-5). The litigation between Petitioners and Gulf involved only three hundred twenty acres out of the three hundred sixty acres involved in the entire suit and brought into question nothing but a leasehold interest, which is all Gulf claimed. The question of the ownership of the fee was the subject of litigation between Petitioners and the five families claiming the fee, and the question of the ownership of mineral interests was the subject of litigation between Petitioners and a large number of the other defendants. Neither the Lewises nor the other fee claimants, nor any of those claiming mineral interests, were parties to the cross-bills of the Ridgways and Gulf. Under the decision of the Mississippi Court, therefore, all of these other parties are estopped even though they were not in court and were not litigating, and even though the issues in-

volved between the parties to the cross-bill were very much narrower than the issues involved as between Petitioners and the other parties.

It is not strange, therefore, that the Supreme Court of Mississippi could not find any authority to cite in support of the decision on *res judicata*. The two cases cited demonstrate the paucity of holdings similar to the one now under consideration. The first of these (*Van Zandt v. Town of Braxton*, 149 Miss. 461, 115 So. 557) was a taxpayer's suit. It was there held that all taxpayers are precluded as to issues once settled in a suit by some taxpayers. This is under well known principles governing "class suits" about which this Court spoke decisively in *Hansberry v. Lee, supra*. The other case (*Watkins v. State Board*, 170 Miss. 26, 154 So. 277) involved exactly the same persons as had conducted a prior litigation. Watkins had first applied to the Mississippi Board of Pharmacy for license as an assistant pharmacist and that had been adjudicated by the board. Later he applied to the same board to be granted a full license. The question in each instance was the applicant's moral character, and the board had already adjudicated that.

Certainly neither of those cases authorizes the holding of the Supreme Court in this case on *res judictata*. The same is true of the four sections of Judge Griffith's book to which the court referred (Appendix 87). Not one of those sections referred to *res judicata* or to parties and privies. Not one of those authorities referred to land titles or to vendor and vendee, or lessor and lessee, or

grantor and grantee, or to any of the legal principles lying at the bottom of *res judicata* in this case.

On the other hand the Supreme Court of Mississippi could have cited some of its own decisions holding in principle directly contrary to the one in this case. Such a case is *Hayes, et al v. First Joint Stock Land Bank*, 174 Miss. 880, 165 So. 605, from which the second syllabus is copied:

> "To apply res judicata rule to persons because of their privity with parties to suit, it must appear that estate or interest sought to be affected was acquired from or through such actual parties after litigation, and if estate or interest was acquired from an actual party prior to the litigation, purchaser for value, unless also party, will not be bound by decree."

Another such case is *Russell v. Federal Land Bank*, 180 Miss. 55, 176 So. 737:

> "Where remaindermen in deeds were not made parties to partition proceedings, remainder was not affected by decree rendered in such proceedings."

And likewise contrary to the decision in this case is *Bass v. Borries*, 116 Miss. 419, 77 So. 189, holding: "In a suit by assignee to foreclose trust deed securing note where the maker sought cancellation of note, interest of original payee, who was not a party, could not be affected"; and also *Coleman v. Smith*, 124 Miss. 604, 87 So. 7.

The court will recall that Gulf was claiming its title as against Petitioners on grounds other than, and not available to, the fee claimants or the other litigants. For

instance, Gulf claimed that it was an innocent purchaser for value without notice, and that Petitioners had estopped themselves to ask cancellation of Gulf's leases by standing silent and watching Gulf proceed with the drilling of wells under the leases Gulf claimed from the other fee claimants.

Under these circumstances and under the record of this case it does not appear but that the judgment on Gulf's cross-bill was predicated on one or more of those independent grounds. Under well settled principles of law, the decision of the Supreme Court of Mississippi seeking to extend the estoppel of the judgment to the fee claimants and the claimants of mineral interests cannot stand.

True-Hixon Lbr. Co. v. Thorne, 171 Miss. 783, 158 So. 909.
Russell v. Place, 94 U. S. 606, 24 L. Ed. 214.
Desollar v. Hanscome, 158 U. S. 216, 39 L. Ed. 956.

The court will recall also that the litigation between the Petitioners and Gulf involved only a limited leasehold interest. Gulf claimed that leasehold interest from the Lewises and the others who claimed the fee. Even assuming that the judgment on Gulf's cross-bill adjudicated that the record title of Gulf or its title by adverse possession was good, could it be said that this adjudication of the question of title was binding on the Lewises and the other fee claimants who were not parties to the litigation between Petitioners and Gulf?

Mutuality is, of course, the essence of *res judicata*. The rule is thus expressed in *50 Corpus Juris Secundum, Judgments*, paragraph 765, page 293:

> ". . . it is a rule that estoppel must be mutual; and therefore, a party will not be concluded, against his contention, by a former judgment, unless he could have used it as a protection, or as the foundation of a claim, had the judgment been the other way; and conversely no person may claim the benefit of a judgment as an estoppel on his adversary unless he would have been prejudiced by a contrary decision of the case."

This Court said the same thing in *Bigelow v. Old Dominion, etc. Co.*, 225 U. S. 111, 56 L. Ed. 1099: "It is a principle of general elementary law that the estoppel of a judgment must be mutual." See also:

> *Chantangco v. Abaroa, 218 U. S. 476, 54 L. Ed. 1116; Litchfield v. Goodnow, 123 U. S. 549, 31 L. Ed. 199; Brooklyn City, etc. Co. v. National Bank, 102 U. S. 14, 26 L. Ed. 61.*

The best way to test the question, therefore, is to turn the situation around and see whether or not a contrary judgment would be binding as between Petitioners and the fee claimants and others.

Suppose the Supreme Court of Mississippi, in the fight between Petitioners and Gulf, had decided that Gulf did not have good title and had avoided the leases given by the Lewises, et al. Would the Lewises be bound by that decree? If later the Lewises sued Petitioners to quiet title to the fee in their land, could Petitioners plead the

decree rendered between them and Gulf as *res judicata* of the Lewis suit? Certainly not. The rule which forbids any such unnatural result is thus stated in *34 Corpus Juris, Judgments,* discussing the relationship of vendor and purchaser (Section 1438, Page 1014):

> "A judgment in an action respecting real property or titles or rights thereto, against a grantor of such property, is binding on his grantee, provided the latter acquired his interest after the institution of the suit, or after the judgment was rendered, in the absence of a statutory provision to the contrary, but not where the rights of the grantee vested before the commencement of the action unless he is made a party thereto. The converse of the rule, however, does not apply as to the grantor with regard to judgments in actions by or against the grantee, A judgment against the grantee of land is not conclusive on his grantor, unless the latter was notified to come in and defend the action and had an opportunity to do so."

Under this authority Gulf, as vendee of title from Lewis, et al, could not possibly preclude Lewis, et al, by any judgment Gulf might have entered whether the judgment was favorable or unfavorable. If the Lewises, et al, are not estopped by the judgment in this case, of course, Petitioners are not estopped.

This Court was dealing with a situation like this in *Kapiolani Estate v. Atcherley,* 238 U. S. 119, 59 L. Ed. 1229, and its decision is cited in support of the text last above

quoted. The third syllabus of that decision sets forth the principle which is controlling here:

> "Notice of the suit and opportunity to defend it must be given to the warrantor of a title, or a judgment against the title in a suit against his grantee will not be available against him, if available at all, in favor of the successful assailant of the title."

The decision in *Chase National Bank v. Norwalk*, 291 U. S. 431, 78 L. Ed. 894, applies in principle here, involving, as it does, the question of whether a mortgagee is precluded by a state court judgment against his mortgagor. This court held the controlling question to be whether the mortgagee acquired his interest before the commencement of this suit. There is, of course, no question that whatever title Gulf had here it acquired prior to the beginning of the suit. The language this Court used in that case is persuasive here:

> "It is true that, in the absence of special circumstances, federal courts consider themselves bound by the construction theretofore given by the highest court of a State to its statutes. But, under well settled principles of jurisdiction, governing all courts, a decree against a mortgagor with respect to property does not bind a mortgagee whose interest was acquired before the commencement of the suit, unless he was a party to the proceeding. *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 122, 57 L. ed. 1410. For in every case where a mortgage was given before the litigation against the mortgagor was instituted, the mortgagee is entitled to have a decision determining his rights rendered on the basis of the facts and considerations adduced by him. * * *"

On a proposition as plain as this it would seem a work of supererrogation to attempt analysis of other cases. Along the same line as the foregoing are *Bigelow v. Old Dominion, etc. Co.*, 225 U. S. 111, 56 L. Ed. 1009; *Postal Telegraph v. Newport*, 247 U. S. 464, 62 L. Ed. 1215; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 57 L. Ed. 1410; *Radford v. Myers*, 231 U. S. 725, 58 L. Ed. 454; *Radio Corporation of America v. Radio Engineering Laboratories*, 293 U. S. 1, 79 L. Ed. 163; *Wood v. Davis*, 7 Cranch 271, 3 L. Ed. 339.

CONCLUSION.

By the decision and judgment in this case these Petitioners stand with the doors of the Mississippi Courts closed to them without having had the opportunity to produce their witnesses and develop their case on the merits. This has been done in the name of the adjective or procedural law of the State. Under the decisions of this Court that adjective law will be examined as it is actually applied to ascertain whether, under the circumstances existing, the steps taken have denied to Petitioners due process of law and the equal protection of the laws. It matters not whether the rule itself transgresses the Constitution or the failure to apply the rule or the manner of its application is "by public authority with an evil eye and an unequal hand" (cf. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Myles Salt Co. v. Board of Commissioners*, 239 U. S. 478, 60 L. Ed. 392), the result is the same. In every case this Court has had before it, it has stated that Constitutional rights may not be denied in the name of local practice.

The merits of the case are not involved. The points made by us relate to procedure alone—to the machinery by which the merits are reached. It would not be proper to advert at all to the supposed likelihood *vel non* that Petitioners will prevail. The question relates alone to whether they are going to be given their day in court.

This Petition and Brief present, we submit, a very clear case where the substantial rights of Petitioners under the Constitution of the United States, raised by them at every step of the proceeding, have been denied under the guise of State procedure, and have been denied without so much as being noticed by the State Court. Under the circumstances we submit that this Court should grant certiorari, and should make the disposition of the case which justice requires (*State of Minnesota v. National Tea Co.*, 309 U. S. 551, 84 L. Ed. 920); and that the Court should reverse the decision of the Supreme Court of Mississippi with directions to enter an order giving Petitioners the right to dismiss their State Court case without prejudice in order that they may be no longer fettered in the prosecution of their Federal actions.

Respectfully submitted,

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TABLE OF CONTENTS.

PAGE

Excerpts from Mississippi Code of 1942 1

Section 1215—

State divided into Districts, Terms of Court controlled by statute 1

Section 1217—

Jasper County, First Judicial District, Terms of Court 1

Section 1274—

Venue of suits of a local nature, process to issue to all counties 2

Section 1286—

When answer due, decree pro confesso in default of demurrer or answer 2

Section 1289—

Answer may include demurrer, Demurrer to be heard promptly, If demurrer overruled, time allowed for answer 3

Section 1296—

Answer may be made cross-bill, service of cross-bill answer and like proceeding as on original bill 4

Section 1297—

Proceedings to compel answer, decree pro confesso or attachment 4

Section 1302—

Amendments liberally allowed 5

Section 1310—

When cause triable, Thirty days allowed after date answer due, unless decree pro confesso entered; Case to be set on proper docket for hearing 5

Section 1412—

Provisions applicable to all courts 5

Section 1538--

Non-suit or dismissal—before jury retire .. 6

TABLE OF CONTENTS—(Continued)

Excerpts from Mississippi Code of 1942—(Cont'd):

PAGE

Section 1539—
Non-suit or dismissal before clerk in vacation, plaintiff to stand as though he had not instituted suit 6
Section 1646—
Special terms 6

Excerpts from Bill of Complaint 8
Motion to Stay Proceedings under Soldiers and Sailors Relief Act 15
Excerpt from Joint Answer of Minor Defendants Claiming Right to Stay under Soldiers and Sailors Relief Act 16
Excerpts from Answer of Gulf Refining Company 17
Cross-Bill of Gulf Refining Company 24
Demurrer to Cross-Bill of Gulf Refining Company 25
Excerpts from Answer of Ridgway Group 28
Motion of Complainants to Dismiss without Prejudice 30
Answer of Lewises to Motion to Dismiss without Prejudice 30
Supplemental Answer of Lewises to Motion to Dismiss 38
Protective Lease from Petitioners to Gulf Refining Company 42
Testimony in Opposition to Motion to Dismiss 55
Rebuttal Testimony on Motion to Dismiss Complaints filed in Federal Court Introduced in Evidence 62
Decree Overruling Motion to Dismiss 63
Letter from Chancellor Advising of Call of Special Term and Advising of Provision for Armed Guards 63

TABLE OF CONTENTS—(Continued)

	PAGE
Protest and Objection of Complainants Claiming Constitutional Rights	64
Transcript of Hearing on Protest and Objections	72
Complainants Withdraw	75
Final Decree	76
Assignment of Errors	79
Opinion of Supreme Court of Mississippi	82

IN THE
SUPREME COURT OF THE UNITED STATES

No. .....

N. L. HUDSON, ET AL.,
Petitioners,

versus

GULF REFINING COMPANY, ET AL.,
Respondents.

APPENDIX TO PETITION FOR CERTIORARI.

EXCERPTS FROM MISSISSIPPI CODE OF 1942.

#1215. Chancery Court district—terms.—The state is divided into eleven chancery court districts, severally numbered and composed of the counties as hereinafter shown. A court to be styled "the chancery court of the county of . . ." shall be held in each county, twice in each year, and as much oftener as is provided by law and shall commence at the time and, if business require, shall continue for the days specified, to-wit:

* * * * * * *

#1217. Second district.

The chancery court terms in the second district shall be as follows:

* * * * * *

Jasper county, first district, second Monday of January, six days, second Monday of July, six days.

* * * * * *

#1274. *Venue of suits.*—Suits to confirm title to real estate, and suits to cancel clouds or remove doubts therefrom, shall be brought in the county where the land, or some part thereof, is situated; suits against executors, administrators, and guardians, touching the performance of their official duties, and suits for an account and settlement by them, and suits for the distribution of personalty of decedents among the heirs and distributees, and suits for the payment of legacies, shall be brought in the chancery court in which the will was admitted to probate, or letters of administration were granted, or the guardian was appointed; other suits respecting real or personal property may be brought in the chancery court of the county in which the property, or some portion thereof, may be; and all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found; and in all cases process may issue to any county to bring in defendants and to enforce all orders and decrees of the court.

#1286. *Defendant to answer or demur, when.*—When the process has been duly executed or publication completed, the defendant shall answer or demur on or before the second Monday of the month next succeeding that to which such process is returnable, or if the process be returnable to a regular term of the court the defendant shall

answer or demur on or before the first day of the term in default of which the bill or petition may be taken *pro confesso* at any rule day thereafter or in term time; and if the bill or petition be taken for confessed against all the defendants, the clerk shall set the cause down on the issue docket at once upon the granting or confirming of the decree *pro confesso* by the court.

#1289. *Legal sufficiency of bill or petition questioned by answer or demurrer—demurrer heard in vacation.*— When a bill or petition is deemed by the defendant to be demurrable he may embrace his defense or defenses thereto in point or points of law in his answer; or he may separately answer and demur; or he may within the time allowed for answer and in lieu thereof demur as heretofore. When a demurrer is filed whether separately, or when embraced in the answer, no part of the answer other than the demurrer shall be considered by the court on the hearing on the demurrer, and no averment in the answer shall be taken as waiving the demurrer or any of the grounds thereof. And when a demurrer is interposed during vacation any party to the suit, including the demurrant, may in the following manner obtain a vacation hearing on said demurrer, viz: He shall give to the opposite party not less than five days' written notice, accompanied with (1) a list of authorities on which he relies, or (2) his brief, if he wishes to elaborate his contentions in a brief, and at the same time he shall file among the papers in the case a copy of said notice and list or brief, within which five days the opposite party may likewise file his list of authorities or brief; and upon the expiration of said time the clerk shall send the entire

file to the chancellor. If either party shall desire to argue the matter orally before the chancellor, he will promptly and within the five days, notify the chancellor, and the opposite parties to that effect, and the chancellor shall fix therefor the earliest convenient and available day on or after the expiration of the five-day period first aforesaid. It shall be the duty of the chancellor to act on said demurrer promptly and in his decree he will fix a reasonable time to amend or answer as the case may be, provided: The chancellor may for just cause enlarge the time for filing responsive briefs, and he may permit or call for additional briefs.

#1296. *Answer may be made a cross bill.*—A defendant in a chancery suit may make his answer a cross-bill against the complainant, or his codefendant or defendants, or all of them; and may introduce any new matter therein material to his defense, and may require the same to be answered; and in the same manner may require of the complainant, or any of the defendants, a discovery of any matter material to his defense, and he shall have process thereon against the defendants to such cross-bill, and the like proceedings thereon as in other bills or cross-bills; but five days' notice, in writing, to the solicitor of the complainant in the original bill shall be sufficient to require the complainant to appear to such cross-bill, and to answer the same within said time, unless the court, or chancellor in vacation, for cause shown, extend the time for answering.

#1297. *Proceedings to compel an answer; defendant attached.*—When a defendant shall fail to answer within

the time required by law, the complainant, instead of taking a decree *pro confesso,* may obtain from the chancellor an order for an attachment, returnable in term-time, to compel such defendant to answer; but affidavit must be first made and filed in the cause, by the complainant, or his solicitor, that such answer is necessary for the ends of justice, as he believes.

#1302. *Amendments liberally allowed.*—Amendments shall be allowed in the pleadings and proceedings, on liberal terms, to prevent delay and injustice.

#1310. *Cause triable when.*—After the expiration of thirty days from the due date of the answer or answers the cause shall be deemed as triable, and the clerk will thereupon, without request set the same down on the proper docket for hearing; but the said thirty-day period of delay shall not apply in any of the following cases: (a) Bills and petitions taken *pro confesso;* (b) *ex parte* petitions; (c) proceedings in partition, where title is not controverted; (d) proceedings to foreclose liens; (e) in matters testamentary and of administration; (f) in minor's business; (g) in matters of persons of unsound mind and (h) in similar cases.

#1412. *Following provisions applicable to all courts.*—All things contained in this chapter, not restricted by their nature or by express provision to particular courts, shall be the rules of decision and proceeding in all courts whatsoever.

#1538. Nonsuit or dismissal—before jury retire from bar.—Every plaintiff desiring to suffer a nonsuit on trial shall be barred therefrom unless he do so before the jury retire to consider of its verdict.

#1539. Nonsuit—in vacation.—The plaintiff may suffer a nonsuit, or dismiss a cause, before the clerk in vacation, on paying all costs that have accrued; and the clerk shall enter on the declaration the disposition made of the same, with the date. Where the plaintiff has received satisfaction of the cause of action in vacation, he shall, by himself or his attorney, enter such satisfaction on the declaration, and sign the same; and where the plaintiff suffers a nonsuit; or dismisses his suit, without having received satisfaction, he shall stand in the same situation as though he had never instituted suit; but, if the defendant have pleaded or filed a set-off, he may elect to proceed on such counterclaim as a plaintiff, with all the rights of a plaintiff, as against the party who has suffered a non-suit or dismissed his cause, whether in term-time or vacation, and may have a new trial, and judgment if he maintain his demand.

#1646. Special terms.—When the business of a circuit or chancery court may require, the judge or chancellor, in term time or in vacation, may order a special term to be held, and the order shall be entered on the minutes or, if made in vacation, on the minutes of the special term. A special term shall not be held in a shorter time than twenty days from the date of the order; and the clerk of the court shall give two weeks' notice of the time of holding the same in some newspaper published in the

county, the proper costs of which notice shall be paid out of the county treasury; or, if there be no such paper, then by advertisement for the like time posted at the court-house door and at three other public places in the county, but a failure or irregularity in giving notice shall not affect the validity of any judgment or proceeding given or had at a special term.

(R. 1) BILL OF COMPLAINT (Excerpts).

Now come your complainants, * * * and in this their bill of complaint exhibited against said defendants herein, to-wit, The Gulf Refining Company, a corporation incorporated under the laws of the State of Delaware, and domiciled at Shreveport, Louisiana, and having offices and agents in the State (R. 2) of Mississippi upon whom personal service of process may be had; * * * (R. 5) would show unto the Court the following facts, to-wit:

That complainants herein are the owners in fee simple title, as tenants in common, to that certain property situated in the First Judicial District of Jasper County, Mississippi, and more particularly described as follows, to-wit:

The East Half of the Southeast Quarter of Section 19; the Southwest Quarter of the Southwest Quarter of Section 20; the East Half of the Northeast Quarter of Section 30; and the Northwest Quarter of Section 29, all in Township 1, North, Range 13, East; and complainants deraign their title to the above described land as follows, to-wit: * * *

(R. 13.) (15) Complainants further allege and aver that the records show that on October 26th, 1937, the said Jettie Kelly Windham, and her husband, George Windham, attempted to execute an oil, gas and mineral lease to the Gulf Refining Company, one of the defendants herein, covering the minerals under the following described lands: * * * which said instrument is recorded at Paulding,

(R. 14) Mississippi, in Oil & Gas Book No. 2, page 251, reference to which is hereby made for the purpose of identification and cancellation, as hereinafter set forth; * * *

(R. 33.) (42) Complainants would further show that the records show that on October 26th, 1937, the defendant, T. D. Lewis, and Annie Lewis, his wife, then and there attempted to execute an oil, (R. 34) gas and mineral lease to the defendant, the Gulf Refining Company, on the land described as * * * containing 122 acres, more or less, which said oil, gas and mineral lease was filed for record on November 5, 1938, and recorded in Book 2, page 219. The complainants further aver that on October 26th, 1937, the said T. D. Lewis and Annie Lewis, attempted to execute a correction mineral lease on the above land, which said instrument was filed for record February 19, 1944, and recorded in Book 9, pages 341-343, which said instruments are hereby referred to for the purpose of identification and cancellation, as hereinafter set forth. * * * that the Gulf Refining Company knew and had actual and constructive notice that the said T. D. Lewis and Annie Lewis were only tenants at the will and sufferance of the complainants; that they knew and had actual and constructive (R. 35) notice that the said T. D. Lewis had only acquired the unexpired life estate of the said Mrs. M. E. Hudson in and to the said land as hereinbefore set forth, and that upon the death of the said Mrs. M. E. Hudson the said T. D. Lewis and Annie Lewis became, were and are tenants at the will and sufferance of these complainants only, and that they had no sort of interest in said minerals under said land, and that the

said oil, gas and mineral lease conveyed no sort of interest in and to the minerals under said land. * * *

(R. 39.) (49) Complainants would further show that on September 17th, 1937, the said Maso Newell, one of the defendants herein, attempted to execute a certain oil, gas and mineral lease to the Gulf Refining Company, one of the defendants herein, covering the land last above described, which said oil, gas and mineral deed is recorded in the office of the Chancery Clerk at Paulding, Mississippi, in Book 6, page 547, which is hereby referred to for the purpose of identification and cancellation, as hereinafter set forth. * * * and that when the said Gulf Refining Company took said lease, they also knew and had actual and constructive notice and knowledge that the said Maso Newell was only a tenant at the will and sufferance of the complainants herein, and that all (R. 40) right, title and interest of the said Maso Newell had expired upon the death of the said Mrs. M. E. Hudson. * * *

(R. 43.) (55) Complainants would further show that the records (R. 44) disclose that on October 26, 1937, the said Margiree Jones and Ab Jones, defendants herein, attempted to execute a certain oil, gas and mineral lease on the land last above described to the defendant herein, the Gulf Refining Company, which said instrument was filed on November 4, 1937, and recorded in Book 2, page 213, which is hereby referred to for identification and cancellation as hereinafter set forth. * * *

(R. 45.) (56) Complainants would further show that the records disclose that on October 26th, 1937, the said

Margiree Jones, and her husband, Ab Jones, then and there attempted to convey to G. R. Ridgway all or a part of the minerals under said land described in the next preceding paragraphs, which said instrument was filed for record on November 1st, 1937, and which was recorded in Book 2, page 169, which is hereby referred to for the purpose of identification and cancellation, as hereinafter set forth. * * * and the said C. R. Ridgway knew and had actual and constructive notice and knowledge of all the facts hereinbefore set forth, and knew that the said grantors in said conveyance had no interest to convey, and that he acquired no interest thereby, but that said instrument operates to cast a cloud, doubt or suspicion upon the title of complainants. * * *

(R. 59.) Complainants charge on information and belief that the said J. S. Wheeles attempted to transfer and assign said lease on the said land above described to the Tidewater Associated Oil Company, but complainants are informed and charge on information and belief that the said Tidewater Associated Oil Company attempted to transfer and assign said oil, gas and mineral lease on said land to the Gulf (R. 60) Refining Company, but that none of said instruments have been found of record, and complainants charge on information and belief that the said J. S. Wheeles, Jr., and said Tidewater Associated Oil Company, or the said Gulf Refining Company claim or are asserting some sort of claim, right or title or interest under said lease recited to have been made in said deed. * * *

(R. 65.) (84) Complainants further aver that claiming under the said oil, gas and mineral lease executed by said T. D. Lewis, as hereinbefore set forth, and the other oil and gas leases heretofore mentioned, the said Gulf Refining Company, one of the defendants herein, then and there well knowing that it acquired no sort of right, title or interest under said oil, gas or mineral leases to (R. 66) the said land, then and there drilled a certain oil well on that part of the said land described as * * *, completed the said well as a producer, and the said Gulf Refining Company is claiming to own under its said oil, gas and mineral lease, seven-eighths interest in said minerals, but, as heretofore shown, the said Gulf Refining Company, has no sort of right, title or interest in and to any of the said minerals, and has no sort of right to occupy the said forty acres of land, or any part of the land hereinbefore described.

That complainants are advised and charge on information and belief, as the owners of the fee simple title in said land, that they are entitled, upon doing equity and paying to the said Gulf Refining Company the actual cost for the drilling of the said oil well, to be put into possession thereof, and that they are entitled, as they are advised and believe, to a temporary injunction enjoining and restraining the said Gulf Refining Company from paying out any part of the royalty under the said land to any of the defendants, as hereinbefore set out, or from converting to their own use any part of the seven-eighths of the said oil, gas and other minerals produced from said land. And complainants here and now offer to do full and complete equity and offer to pay when and as soon as

same can be ascertained, the actual cost of the drilling of the said oil well, or any other wells that may be drilled on the said lands herein described, so as to reimburse the said Gulf Refining Company for all costs and expenses in the drilling and equipping of the said oil wells.
* * *

(R. 67.) Wherefore, the premises considered, the complainants pray that all of said defendants herein be summoned as required by law to be and appear at the July 1944 Term of this Honorable Court to be held on the Second Monday in July, 1944, then and there to plead, answer or demur to the allegations of this bill of complaint, but not under oath, answer under oath being hereby expressly waived, and that upon a final hearing hereof this Court will adjudge and decree that the complainants are the owners in fee simple of the lands hereinabove described, and that this Court will cancel all of the instruments insofar as the same purport to or (R. 68) attempt to convey any part of the said lands or any interest therein. That this Court will hold that the defendants herein, having acquired their interest from life tenants or tenants at will and sufferance, became, were and are the tenants at the will and sufferance of the complainants, and that all of said instruments hereinbefore pointed out in said bill of complaint be cancelled insofar as the same affect the title of the complainants to the said lands hereinbefore described.

That this Court will order an accounting to determine the cost of drilling and equipping the said T. D. Lewis well, and also the cost of drilling and equipping the said Lewis-Morrison well, and that if complainants are entitled to recover their *pro rata* part of said Lewis-Morri-

son well, that the proportionate part of the cost thereof be also ascertained, and that the Court will order an accounting of the oil that has been produced or sold from the said wells, and that complainants have a decree for all of said oil or the value of all of said oil or other minerals that may have been produced or sold from the said Lewis well, and their *pro rata* part of all oil produced from the Lewis-Morrison well, and that after the cost of drilling and equipping the said wells has been ascertained, upon payment by complainants to the said Gulf Refining Company, or tender to them of the cost of drilling and equipping said wells, as hereinbefore set forth, that the said Lewis well be decreed to be the property of complainants, together with all oil produced therefrom, and that they be decreed to own their *pro rata* share in the Lewis-Morrison well and the oil produced therefrom.

Complainants further pray that this court shall issue from time to time, as the equities of the case may require, temporary injunctions and restraining orders or other process to protect the rights of all parties hereto pending the final determination of this cause, and that upon final hearing that this Court will grant writs of possession, where necessary, to put the complainants in (R. 69) possession of all or any part of the said lands.

And if complainants have not prayed for the proper relief, or have prayed for wrong, improper or insufficient relief, then they pray for such other, further, general and different relief as may be just and equitable in the premises.

And complainants will ever pray, etc.

* * * * * *

(R. 119) MOTION TO STAY PROCEEDINGS.

To the Honorable Chancery Court of said District and County:

Comes Mason Newell, Sr., guardian of the estates of Claudies Newell and Paul Ellis Newell, minors, and respectfully represents unto the court that his wards, Claudies Newell and Paul Ellis Newell, are now in the military service of the United States of America, and that said awards have not been legally served with process and that the said Claudies Newell and Paul Ellis Newell are entitled under the provisions of the Soldiers and Sailors Civil Relief Act of 1940 to a stay, postponement and suspension of the prosecution of this suit for the period of their military service and three months thereafter.

Petitioner further represents unto the court that the rights of the said Claudies Newell and Paul Ellis Newell will be prejudiced by the trial of this cause without their presence. Petitioner further represents unto the court that the complainants in the above styled cause have filed no affidavit stating that the said Claudies Newell and Paul Ellis Newell are not in the military service of the United States of America and further represents that the said complainants did not make diligent search and inquiry as to the present post office address, residence and street address of the said Claudies Newell and Paul Ellis Newell, which inquiry, if the same had been made, would have developed that the said Claudies Newell and Paul Ellis Newell are both in the military service of the United States.

Wherefore, premises considered, petitioner prays that (R. 120) the prosecution of the above styled cause be stayed, postponed and suspended during the period of the military service of the said Claudies Newell and Paul Ellis Newell and until they are legally served with process and have an opportunity to defend said suit. * * *

(R. 175) JOINT ANSWERS OF MASON NEWELL, SR., INDIVIDUALLY, AND MASON NEWELL, SR., GUARDIAN OF THE ESTATES OF CLAUDIES NEWELL, PAUL ELLIS NEWELL, ALFONZO NEWELL, JUANITA NEWELL AND MASON NEWELL, JR., MINORS (Excerpt).

* * * * * *

(R. 202.) Defendants would show unto the court that the wards of the defendant guardian, namely Claudies Newell and Paul Ellis Newell, are both in the military service of the United States of America, and that said wards have not been personally or legally served with process in this cause, and the said guardian hereby reserves unto his said wards all rights and privileges to which they are entitled to under the Soldiers and Sailors Relief Act, and would show unto the court that this answer is not intended to waive any rights on the part of the said two wards of said guardian, but all rights which they are entitled to assert in this cause on their (R. 203) behalf are prayed to be reserved unto said minors and to be retained by them, notwithstanding any allegations in the foregoing answer. * * *

(R. 271) ANSWER AND CROSS BILL OF GULF REFINING COMPANY (Excerpts).

Gulf Refining Company, a Delaware corporation, herein called "respondent" or "defendant", for answer unto said bill or such parts thereof as it is advised it is necessary for it to answer, answering says: * * *

(c) Herein "adverse possession", or equivalent phrase, means that the persons owning and through whom defendant claims were (R. 272) in actual possession of the land whereasto the averment is made, and that such possession was actual, continuous, exclusive, hostile, notorious, and open, under claim and color of title, as owners, and existed for a period in excess of ten years without interruption, and consisted in the enjoyment of the land as by an owner, and without limiting the foregoing generalization, consisting in cutting, selling, using timber and wood, farming, erection of houses and improvements, pasturing stock, assessing and paying taxes, leasing, both for agricultural purposes and for oil, gas and other minerals, and mortgaging the lands and doing each and every act that the lawful owner could do.

(d) Defendant had to it executed those mineral leases shown by EXHIBIT A, and made part hereof, which leases defendant acquired in good faith, paying value therefor, believing that its lessors were the sole, true, and lawful owners of the lands described in said leases, who were at the time of such leases in exclusive possession under deeds purporting to convey title in fee simple, such lessors at the time of such leases being in the sole and

exclusive possession of the entire tract of land described therein, and severed the mineral estate by the execution of the leases, whereafter this defendant took possession of the leasehold estate in said lands, pursuant to the terms of said leases, and was in the open, notorious, exclusive, adverse possession thereof against all persons other than its lessors, claiming said leasehold estate continuously under color of title and claim of right. Thereon this defendant paid the taxes, prospected, developed, and expended in drilling oil wells more than $150,000.00, and when it so thus acquired said leases, it was a purchaser for value in good faith and without notice, as herein defined.

(e) "Purchaser for value", or equivalent phrase especially when applied to the Gulf Refining Company, shall mean that it purchased and at the time of such purchase had no knowledge or notice (R. 273) actual or constructive of any claim or equity, adverse to or inconsistent with the fee simple title claimed and shown by the public records to be possessed by its lessors, respectively, and that without such notice or knowledge, it paid value for the legal title to that acquired under said leases, and since the date of acquisition has continuously paid taxes thereon as owner, and the delay rental contracted for, and exercised without interruption all ownership rights thereover. * * *

(R. 275.) Defendant purchased subsequent to three years from September 11, 1932, from responsible parties in possession, claiming the title in fee simple under absolute deeds to them executed and duly recorded, with

possession held for more than forty years. Defendant was assured by such persons so thus in possession of their ownership and their right of disposition, and to ther this defendant paid value for its leasehold estates, as shown by EXHIBIT A hereto annexed, promptly filed for record, and duly recorded. * * *

(R. 279.) (15) Defendant admits that Jettie Kelly Windham, and her husband, George Windham, executed an oil, gas, and mineral lease to this defendant, covering the land described in said bill, which instrument is recorded, as averred, and denies that said Jettie Kelly Windham and George Windham had no interest in said land, but were only tenants at will and sufferance of complainants. Defendant denies that said Jettie Kelly Windham and said George Windham so knew and denies that this defendant had actual and constructive notice thereof. On the contrary, this defendant purchased said lease and paid therefor in good faith, believing that said lessors owned the fee simple title, and being led thus to believe in said 1937 by all the information available from the public records of said County and by the claim and possession of its lessors whereon (R. 280) defendant relied and upon the faith of which it purchased and paid value. Said Windhams were in possession under absolute fee deeds running back for more than forty years. * * *

(R. 284.) (42) Defendant admits the execution of the oil, gas and mineral lease by T. D. Lewis, and Annie Lewis, his wife, to this defendant to the property described, and avers that it purchased said property in good faith and for value from the owner in possession claiming

title, duly evidenced by recorded deeds in fee simple. Defendant admits the execution of the correction deed, denies that at the time of the execution of said lease the said T. D. Lewis and Annie Lewis had no right, title, or interest in or to said land. Defendant denies that said T. D. Lewis and Annie Lewis knew or had actual and constructive notice, and the Gulf Refining Company had actual and constructive notice that the said T. D. Lewis and Annie Lewis were only tenants at the will and sufferance of the complainants, and denies that they were such in fact. * * *

(R. 286.) (49) Defendant admits that on September 17, 1943, (not 1937), by instrument recorded in Book 6, page 547, it acquired an oil, gas and mineral lease from Mason Newell, who was in possession claiming as the owner in fee under duly recorded instruments, and that therefor defendant in good faith paid value without notice or knowledge of any claims of complainants, and has continuously remained in possession through payment of delay rental and is presently the owner of those rights therein contained.

Defendant denies that at that date Mason Newell was a tenant at will or by sufferance, and denies that defendant knew or had notice that said Newell had only an estate at will or by sufferance, and denies that all of the rights of the said Newell had expired from the death of the said Hudson.

Defendant acquired in good faith all of its leases from lessors in possession under recorded instruments, showing

fee simple titles, claiming to own the property and to have the right of disposition. Said persons and their predecessors in title had been in adverse possession of that leased as hereinbefore defined, so that when defendant thus acquired from its said oil, gas, and minerals, it did so from those thus owning and in possession and that it was and is hereby a *bona fide* purchaser for value without notice. Defendant (R. 287) avers complainants, by reason of the lapse of more than twenty years, will be presumed to have executed a proper grant to those under whom this defendant claims.

As to the other allegations contained, defendant is without knowledge, information, or belief, and if its rights are to be in any way affected, demands strict proof. * * *

(R. 294.) (84) Defendant admits that it drilled a well on the T. D. Lewis land, but denies that it knew anything at all or had any notice at all of the alleged rights claimed by complainants.

Defendant admits that said well came in as a producer and admits that it claims to own the same in manner and form as set out in said EXHIBIT A, and denies that it has no right, title, or interest therein or thereto, but avers that it so has.

Defendant denies that complainants are the owners in fee simple and denies that they are offering to do full equity, for the amount expended in attempting to discover oil was very great, and having succeeded, the benefits of said discovery is not to be taken from defendant by complainants, who stood by and did nothing.

Defendant denies that complainants are entitled to a temporary injunction, defendant claiming in good faith and for value under a title reaching back for sixty-five years, and being amply solvent.

(R. 295.) Defendant denies that they are entitled to an injunction restraining the paying out of the royalty, as averred, or from converting to their own use any of the 7/8ths of the oil and gas produced from said land.

(85) Defendant admits the drilling and operating of the Lewis-Morrison well and admits the payment of the royalty, as averred, under lease, as averred, and admits that it is withdrawing said oil and has a right thus to do, and denies that complainants, or any of them, are entitled to any production from said one acre tract, or that they or any of them have any right, title, or interest in or to said land, or any part thereof.

Defendant denies that any survey is essential and denies that the complainants are entitled to any relief. * * *

(R. 299.) (h) Further answering, in the alternative, defendant represents that in the event the court should hold that the plaintiffs are the owners of the said lands, or any part thereof, against which defendant protests, then in that event and in the alternative defendant avers that such recovery of title and ownership by the complainants should not be allowed to the prejudice of the defendant but should be subject to and burdened with all the rights acquired by defendant under the aforesaid leases, all of which rights should be maintained and recog-

nized to be in full force and effect and binding upon complainants for the reasons, among others, (1) complainants wholly failed to modify, limit, question, or dispute the absolute disposition assumed to be made to the said Mary E. Hudson and by said Mary E. Hudson and by those claiming under and through her, although complainants had actual and constructive notice of such deeds and conveyances and had actual and constructive notice that Mary E. Hudson's vendees were exercising all acts of ownership over the land, under which deeds Mary E. Hudson and subsequent vendees were proclaimed to be the fee simple owners, and (2) complainants wholly failed and refused to have any of the deeds under which they herein claim to be re-recorded or re-established following their destruction by fire on September 10, 1932, as by the statutes of the State of Mississippi authorized and required, and by reason of such failure and refusal, as aforesaid, this defendant was led to and did acquire, subsequent to September 10, 1935, its said mineral leases in good faith, paying value therefor, from the parties in possession claiming to own the same in fee simple, as shown by the public records and deeds in their possession, without knowledge or notice, (R. 300) actual or constructive of any claim or equity, adverse to or inconsistent with the fee simple title claimed by its lessors, and complainants are now estopped to deny or question the validity and binding effect of said leases, which estoppel is hereby specifically pleaded as a bar to the demands and claims of complainants for the cancellation of said mineral leases.

V. Cross Bill.

And now having fully answered, this defendant makes its answer a cross bill and avers further, as follows, to-wit:

Cross complainant reavers by reference all facts precedently herein set forth, and that under said facts cross complainant avers that its leases shown in EXHIBIT A are good and valid and should be ratified and confirmed as against cross defendants, but should the Court not so decree, then, as against said cross defendants, cross complainant is entitled to an accounting whereby it will be vouchsafed a return of that by equity allowed, and therefor it hereby prays.

Cross complainant makes cross defendant all of the original complainants and prays that they be required to plead, answer, or demur, answer under oath being expressly waived, and that upon final hearing that said leases shown in EXHIBIT A be confirmed; if not, cross complainant be given that whereto under equity it is entitled, and for such other, further and general relief as in equity and good conscience it is entitled.

Respectfully,

GULF REFINING COMPANY * * *

On behalf of Cross Defendant named, copy of Cross Bill (R. 301) acknowledged on this date and further service waived.

(S.) L. F. EASTERLING,
Atty. for Cross-Defendants * * *

(R. 398) **DEMURRER.**

To the Chancery Court of the First Judicial District of Jasper County, Mississippi:

Now come the complainants herein, who are named as cross-defendants in the answer and cross-bill filed herein by the defendant and cross-complainant, Gulf Refining Company, by their attorneys, and demur to the said cross-bill, and for cause of demurrer thereto assign the following grounds, to-wit:

(1) The allegations of the cross-bill all go to a denial of the right of complainants to recover and are in effect but a defense to the bill of complaint and a denial of the right of complainants in the property sued for and to the right of complainants to recover said property and to the relief prayed for in the bill of complaint.

(2) The cross-bill presents no grounds for relief and is nothing more than an answer to the allegations of the bill of complaint.

(3) The cross-bill seeks no affirmative relief which could be granted as a matter of law under the allegations of the said cross-bill.

(4) All the relief prayed for in the cross-bill can (R. 399) properly and effectively be granted on the original bill of complaint and the answers thereto.

(5) All relief sought by the cross-bill is available to and can be had by the cross-complainant on the original bill

and the answers thereto in any final decree entered thereon.

(6) The cross-bill seeks to have ratified and confirmed by decree of this court, as against cross-defendants only, oil, gas and mineral leases executed to cross-complainant by other defendants herein, and not by cross-defendants, and the allegations of the cross-bill show that cross-defendants herein never executed and were not parties to or bound by said oil, gas and mineral leases or any of them; and, therefore, that cross-complainant is not entitled to have the same ratified and confirmed as against cross-defendants.

(7) The cross-bill seeks, in the alternative, as accounting whereby cross-complainant "will be vouchsafed a return of that equity allowed", without setting out the facts necessary to entitle cross-complainant to such relief.

(8) In the original bill, on pages 72 and 73, complainants and cross-defendants offer to do equity and to pay, when and as soon as the same can be ascertained, the actual costs and expenses of drilling and equipping any of said oil wells. On page 74 of said original bill it is prayed that an accounting be had to determine the costs and expenses of drilling and equipping said wells. The remedy of an accounting is sought in the original bill, and is thereby made available to cross-complainant herein, and therefore cross-complainant would be entitled to all and singular any and all relief sought by the cross-bill therefor.

(9) And for the other causes to be assigned at the hearing.

(S.) L. F. EASTERLING,
(S.) LESTER FRANKLIN,
Attorneys for Cross-Defendants.

(R. 400) CERTIFICATE.

We, the undersigned attorneys of records for cross-defendants, hereby certify that, in our opinion, the foregoing demurrer is well founded in point of law and should be sustained.

This the 25th day of September, 1944.

(S.) L. F. EASTERLING,
(S.) LESTER FRANKLIN,
Attorneys for Cross-Defendants.

(R. 452) ANSWER OF C. R. RIDGWAY, ET AL (Excerpts).

Now come Ridgway & McGehee, Inc., a Delaware Corporation, duly authorized to do business in Mississippi; Laurel Royalty Company, a Mississippi corporation; Magnolia State Royalties, Inc., a Mississippi corporation; Byrd-Frost, Inc., a corporation under the laws of the State of Colorado; L. E. Ridgway, Mrs. Leona M. Ridgway, W. E. McGehee, Mrs. Della Jones McGehee, Mrs. Hattie L. Ridgway, Mrs. Alice R. Blount, Mrs. Ruth R. Boswell, William Bryant Ridgway, W. S. Ridgway II, C. R. Ridgway, Jr., Sara R. Ridgway, all having a business domicile at Jackson, Mississippi; A. G. Dorchester, a resident citizen of Shreveport, Louisiana; H. C. McGehee, J. F. Moore and J. D. Griffing, resident citizens of Berryville, Virginia; E. B. McGehee, a resident citizen of Hinds County, Mississippi; C. Montfort McGehee, a resident citizen of Bristow, Oklahoma; B. M. Jones, a resident citizen of Holmes County, Mississippi; R. L. Jones, II, and E. E. Jones, resident citizens of Washington, D. C., and C. R. Ridgway, Jr., heretofore executor of the estate of C. R. Ridgway, deceased, herein called "Respondents", and for answer unto said bill or such parts thereof, as well as the amendment thereto, as they are advised is essential for them to answer, answering say:

1. To save prolixity by reference they and each of them adopt each and every affirmative averment and each and every denial contained in the answer of the Gulf Refining Company herein heretofore filed, as fully and completely, with all of the exhibits thereto, as though this answer contained said allegations and denials in (R.

453) full appropriately phrased to make them applicable to those herein thus appearing.

2. Respondents aver that Margiree Jones and her husband, Ab Jones, being the owner of and in possession of that certain land described in Section 56 of said original bill, asserting the right then and there to sell and convey the same, made, executed, and delivered to C. R. Ridgway a certain mineral deed in the form of EXHIBIT A hereto annexed and made part hereof, as fully as if copies herein, whereunder and whereby there was conveyed to said Ridgway and in him vested each and every right in said EXHIBIT A to set forth in manner and form as set forth, and that thereof said C. R. Ridgway became by purchase for value without notice the sole, true and lawful owner, * * *

(R. 455.) 6. Respondents likewise now adopt each and every separate affirmative defense by reference interposed by the Gulf Refining Company, which is applicable and appropriate to them, to save prolixity.

And now having fully answered, pray to be hence dismissed.

And now, Respondents readopt each allegation made herein and make this answer a cross bill against all complainants, reaverring all things contained in the answer of said Gulf Refining Company and contained herein and aver title to be in them vested in manner and form as shown.

Wherefore, Respondents pray that said title so thus vested, deraignment being as shown in the original bill, the answer, and herein, be confirmed and quieted.

Answer under oath is expressely waived.

Such further relief as the parties is entitled to is asked.

* * *

(R. 605) MOTION TO DISMISS WITHOUT PREJUDICE.

To Said Court:

Come the complainants, by their attorneys, and move the court to dismiss this suit without prejudice at the cost of the complainants, which costs are tendered herewith.

LAMAR F. EASTERLING,
LESTER C. FRANKLIN,
GEORGE E. SHAW,
CAMERON & WILLS,
(S.) By BEN F. CAMERON,
Solicitors for Complainants.

Filed Dec. 12, 1945. J. J. Denson, Clerk, Dorothy E. Lightsey, D. C. * * *

(R. 606) ANSWER OF THE DEFENDANTS TO THE MOTION OF THE COMPLAINANTS TO DISMISS THIS CAUSE WITHOUT PREJUDICE.

To the Chancery Court of said District, County and State:

And now come T. D. Lewis, Mrs. Annie Lewis, Rufus William Lewis, Thomas Melvin Lewis, Alvin Melton Lewis,

Helen Willema Lewis, adults, and Lucius Cook Lewis, Myrtis Lewis, Myrtle Lewis and Annie Catherine Lewis, Minors, by Thomas Melvin Lewis, their brother and legal Guardian, and the Tidewater Associated Oil Company, a corporation, and S. J. Hooper, H. A. Smith, and Mrs. Mamie Abney, some of the defendants in the above styled cause, and jointly and severally file this answer to the motion of the complainants to dismiss the original bill of complaint and all amendments thereto, without prejudice, and by way of objections to the dismissal of said bills without prejudice, and for grounds of objection, show the following, to-wit:

1. This cause was originally returnable to the January, 1945 term of this Honorable Court, and the complainants have sought and obtained several continuances of this cause. As shown by the original bill of complaint, they rely upon an alleged lost deed executed in or about the year 1878. On the face of the record, complainants are guilty of laches in filing this suit, and furthermore have been guilty of laches in their failure to prosecute the same diligently, and now they seek to dismiss without prejudice and (R. 607) reserve their rights to file another suit and thereby further delay a final determination of the issues presented by the pleadings in this cause. As a matter of fact, they have attempted already to file similar suits in the Federal District Court at Meridian, Mississippi, far removed from the county in which the lands are located, in which most of the witnesses reside, and the county in which the public records are available on the issue of title. No good cause is assigned for dismissal without prejudice, and the Court should not be called upon to assist

the complainants in preserving alleged rights based upon a stale case, or give countenance to their continued laches. The original bill of complaint sets forth the destruction of the court house and public records of the First Judicial District of Jasper County, Mississippi, in 1932, and if the complainants claim title under an alleged lost deed, which they aver was of record, and if said lost deed and the record thereof were destroyed, complainants had a remedy by Section 2346, Mississippi Code of 1930, to establish said lost deed and failed, neglected and refused to avail themselves of said quick or summary remedy, and in and by said failure are guilty of laches in asserting rights based on said alleged lost deed, and they filed no suit or made no claim to the lands involved in this proceeding until after a large oil field was developed and oil was produced from the lands herein involved.

2. The filing of the original bill in this cause has caused the Gulf Refining Company, which has a mineral lease on most of the lands claimed herein by T. D. Lewis and his family, and the Tidewater Associated Oil Company, which has a mineral lease on a portion of the lands owned by the Lewis family, to withhold the payment of royalties due under said mineral leases on the producing oil wells drilled in pursuance of said leases, and now drawing large quantities of oil from the lands involved in this suit. The adverse claim of the complainants in the filing of this suit has led the said Gulf Refining Company to negotiate for and obtain from the complainants (R. 608) herein, a so-called protective mineral lease, dated the 15th day of December, 1944, and of record in Deed Book No. 18, pages 479-485 of the Records of Deeds in the Office of the

Chancery Clerk of the First Judicial District of Jasper County, Mississippi, copy of which lease is hereto attached as a part hereof, marked Exhibit "A". The rights undertaken to be granted by the complainants to the lessee in said lease were bought for a substantial consideration. Paragraph 14 of said protective lease embraces a contract and understanding that the Gulf Refining Company does not admit that the complainants, the Hudsons, have any title to the oil, gas or minerals that may be produced, until by compromise settlement "or final decree in the suit entitled N. L. Hudson, et al, Complainants, vs. Gulf Refining Company, et al, Defendants, No. 398, First Judicial District of Jasper County, Mississippi", the complainants are given in that suit some title or interest in the lands or to the oil, gas and other minerals thereon and thereunder. By said paragraph, it is recited that the lessee, the Gulf Refining Company, claims and asserts that it has a valid mineral lease "executed by T. D. Lewis and Annie Lewis, recorded in Oil Lease Book 2, Page 39", etc., and further, that said company has a valid lease from Jettie Windham, et al, also of record, and two other valid mineral leases therein referred to, and that the Gulf Refining Company accepts the Hudson lease "solely for the purpose of buying its protection" to the title and to all the oil that may be or has been produced from said land under the terms of the Lewis lease; that the lessee, the Gulf Refining Company, shall never be called upon to recede from that position, and that it shall be just as free to assert that the lessors in the Lewis lease and the other leases therein mentioned have valid titles to the whole of the lands covered thereby, and to all of the oil, gas and other minerals thereunder. It is expressly provided that

the complainants herein, the Hudsons, shall not be entitled to, and the (R. 609) lessee, the Gulf Refining Company, shall be under no obligation to pay to the complainants, "any of the royalties or any part thereof provided for herein, unless and until the suit entitled N. L. Hudson, et al, Complainants, vs. Gulf Refining Company, et al, Defendants, No. 398, Chancery Court of the First Judicial District of Jasper County, Mississippi, lessor shall have established by compromise settlement between the parties thereto, or by final decree of the court therein, that the lessor herein is the owner of the lands and minerals hereby leased and involved in said suit, or the owner of an interest therein." Thereby, the parties contracted and agreed, for a valuable consideration, to submit to the Chancery Court of the First Judicial District of Jasper County, in this particular suit, the all-important question of title as between the complainants on the one hand and the defendants on the other hand, and the question as to which group is entitled to the accumulated royalties and the royalties hereafter to accrue. By said contract, the parties have made this Honorable Court the final arbiter of all controversies between the parties hereto. The provisions of said protective lease inure to the benefit of all these defendants. They are referred to expressly. The royalties due them have been withheld, and they are looking to this Honorable Court to release those royalties to them. They have a direct interest in said contract, and respectfully submit that said contract was made for their benefit as well as for the benefit of the Gulf Refining Company. The execution and delivery of said protective lease was brought about by the filing of this suit, grows out of said litigation, refers to it and agrees

to be bound by the determination of this Honorable Court, and thereby these defendants have acquired a right during the progress of this litigation which is undertaken to be changed, modified or done away with by the motion herein filed to dismiss without prejudice, thereby delaying final determination of the issues presented by the pleadings in this cause, to the great damage and injury of all these defendants. (R. 610.) The lands involved in this litigation are commonly known as farm lands, and prior to the discovery of an oil field thereunder, could be utilized by hard labor in producing crops, but the development of oil, the drilling of several wells on the lands herein involved, and the piping of said oil has interfered tremendously with any profitable farming operations. The filing of an unjust suit has operated to withhold from those defendants owning and in possession of the lands from realizing on the royalties due them, and this Honorable Court has at least constructive possession of said royalties, with the right to determine ownership thereof in this particular cause, and the dismissal of this suit would embarrass and damage these defendants in realizing upon said royalties, and cause doubt and confusion as to their right thereto. Many witnesses having knowledge of the ownership and possession of the lands and being in position to give relevant testimony are advanced of age and one or more of them may die at any time and thereby further embarrass these defendants in producing before this Honorable Court the relevant and pertinent facts that would guide this Court to the right conclusion. The public records are in the Court House where this Honorable Court sits, and can be produced with less expense and less embarrassment and trouble than

would be required if this cause is tried in the Federal District Court, or some other tribunal. The venue is properly in this Court, where the lands are located, this suit being essentially one *in rem*. Defendants submit, therefore, that not only have the complainants contracted, for valuable consideration, that the issues be tried in this particular case and in this court, and are, therefore, estopped now to dismiss their cause, but the dismissal would deny to these defendants a valuable right guaranteed and vouchsafed by said contract, and furthermore, a dismissal would embarrass and delay these defendants in arriving at a prompt and righteous decision that would put all of these questions at rest and hasten the time when the defendants, T. D. Lewis and family, could (R. 611) realize upon the royalties due them.

3. On or about May 18th, 1945, the complainants herein, for valuable consideration, executed to the Tidewater Associated Oil Company, one of the defendants herein, a so-called protective mineral lease similar in all respects to the lease hereinabove referred to as being executed in favor of the Gulf Refining Company. Said lease was filed for record June 5th, 1945 and is of record in Book 20, Page 391 of the records of deeds and conveyances in the First Judicial District of Jasper County, Mississippi, which is here referred to, and a true copy thereof filed herewith as Exhibit "B", and asked to be taken as a part of this answer as fully as if copied herein. Paragraph 12 thereof contains provisions almost identical with the provisions of Paragraph 14 in the protective lease executed in favor of the Gulf Refining Company. These defendants refer to and rely upon said provisions and reaver

thereto all facts hereinabove alleged with reference to the Gulf Refining Company lease. By the terms of Paragraph 12, this Honorable Court is made the final arbiter as to the alleged claim of the complainants to the lands herein involved, and to their right to royalties under the producing wells on said lands, and particularly as to the royalties due by the Tidewater Associated Oil Company. It is therein expressly agreed and understood that the complainants' right to any royalties would abide and be controlled by the decision of this Honorable Court in this very suit. Said contract necessarily inures to the benefit of T. D. Lewis and his family, defendants herein, and others of their co-defendants, and the complainants have no right to dismiss this suit without prejudice and thereby leave hanging in doubt the right of these defendants to realize upon said accumulated royalties and the royalties to accrue. It follows that these defendants have obtained rights which will be taken away from them by the dismissal of this suit, and they jointly and severally object thereto and they reaver the damaging consequences which would result as to the Tidewater (R. 612) Associated Oil Company lease, the same as hereinabove averred with reference to the Gulf Refining Company lease.

4. Defendants furthermore submit to the Court that the Gulf Refining Company, one of the defendants herein, has a cross-bill which should be maintained and prosecuted, to validate the mineral lease executed by the defendants, T. D. Lewis and Mrs. Annie Lewis, and for other relief, and that the dismissal of the original bill would not operate to dismiss the cross-bill. The defendants, T. D. Lewis and family, are directly interested in said cross-bill, and have

the right to intervene therein, to the end that the lease executed by the said T. D. Lewis and Mrs. Annie Lewis, should be validated by this Honorable Court, at the request and suit of the Gulf Refining Company on its cross-bill. If said cross-bill is retained and the Court permits a dismissal of the original bill, it would create confusion as to the issues between all parties hereto. It is important to all of the parties that the rights of the Lewis family be settled in this proceeding. The mineral rights of the Gulf Refining Company grow out of their conveyance and their rights are so inter-related with the rights of the Gulf Refining Company and the rights of the Tidewater Associated Oil Company, that it would be difficult to proceed without having the whole issue determined in one cause.

Wherefore, for reasons assigned, these defendants, jointly and severally, object to the sustaining of the motion of the complainants to dismiss the original bill, as amended, without prejudice, and ask this Honorable Court to proceed to a final determination of this cause without further delay. * * *

SUPPLEMENTAL ANSWER OF SAME DEFENDANTS TO MOTION TO DISMISS.

(R. 695.) Now come T. D. Lewis, * * * some of the defendants in the above styled cause, and jointly and severally file this supplemental answer to the motion of the complainants to dismiss the original bill of complaint and all amendments thereto, without prejudice, supplementing their answer to said motion heretofore filed in

said cause, and by way of further objections to the dismissal of said original bill of complaint and all amendments thereto, without prejudice, would show unto the court the following facts, to-wit:

1. On March 8, 1945, the complainants in this cause filed a motion praying the court to grant a decree or order requiring the defendants in said cause, including these defendants, to submit for inspection of the counsel of complainants certain books, records, documents, and information alleged to be in the possession of the defendants, including affidavits, opinions of title, abstracts, chains of title, original instruments, correspondence, and other (R. 696) books, records, and documents, statements, instructions, and correspondence between the defendants and their employees relating to the merits of this action and proceeding, and the defense thereto, and all information that the defendants had compiled in the matter of preparation for the defense of this action.

That a hearing was had on said motion before the Chancellor, in vacation, at Meridian, Mississippi, on March 15, 1945, at which hearing the court entered a decree allowing counsel for complainants to examine the originals of certain instruments and a certain abstract of title, which were then of record in the office of the Chancery Clerk at Paulding, Mississippi, but overruled the said application and motion as to all other parties and as to all other books, papers, records, and documents referred to in said motion.

A true copy of said motion as to the defendant, T. D. Lewis, which is the same motion as was made as to the other defendants, and a true copy of said decree are each made exhibit to this answer, and the originals thereof will be presented at the hearing hereof.

2. By this decree these defendants acquired a valuable right in this lawsuit in that the cause has proceeded to such a point, and such steps have been taken, that the defendants have secured some substantial rights which would be destroyed by dismissal, and it should not be permitted.

The complainants, prior to the filing of this motion to dismiss in this court, filed separate actions against several of these defendants in the District Court of the United States for the Eastern Division of the Southern District in Mississippi, which suits are grounded upon the same alleged facts, and upon similar allegations as in this suit, No. 398, in this court and the complainants are attempting to have this cause dismissed in this court so that they may proceed against these and other defendants in said Federal Court. The said complainants, if this cause is dismissed in this court, and they are allowed to proceed against these defendants in said Federal Court, will again attempt to require these defendants to furnish the (R. 697) complainants or their counsel with the information and affidavits, memoranda, etc., compiled by these defendants and other defendants for their defense of this suit, which has been refused the said complainants by the said decree of this court upon said motion in March, 1945. It is respectfully submitted that it would be unfair and unjust and contrary to the general public policy to permit a dismissal of the

original bill and the amendments thereto in this cause, without prejudice, which would have the effect of changing the strategical position of the parties.

Wherefore, for the reasons assigned, these defendants jointly and severally object to the sustaining of the motion of the complainants to dismiss the original bill and all amendments thereto without prejudice, and respectfully pray this Honorable Court to proceed to a final determination of this cause without further delay. * * *

(R.754.) Whereupon, the Defendants in contest of said motion offered and introduced the following:

(R. 755.) By Mr. Buchanan:

The defendants introduce deed book 18, pages 479-485, showing protective mineral lease from N. L. Hudson, et al, to Gulf Refining Company, dated December 15, 1944, said instrument being in words and figures as follows, to-wit:

OIL, GAS & MINERAL LEASE.

Dated: Dec. 15, 1944.

Filed: Dec. 21, 1944: 4:15 PM.

Recorded:

Recorded:

Jasper County, Miss., 1st Dist.

From Original Instrument.

Mrs. Lloyd K. Tilgham, Graydon M. Blackmon, Mrs. Gertrude Hudson Ellison, Mrs. Lessie Hudson Smith, May I. Hudson Thompson, Mrs. Grace Hudson Hyde, Mrs. Exie Hudson, Philip L. Hudson, Charles A. Hudson, E. S. Blackmon, Mrs. May Hudson, Mrs. Ruby Mae Mitchell, and N. L. Hudson, sole existing heirs at law of Noah L. Hudson and Mrs. Mary E. Hudson, both deceased; and L. F. Easterling and L. C. Franklin, Lessor,

to

Gulf Refining Company, Lessee.

State of Mississippi,
County of Jasper.

Know All Men By These Presents:

That Mrs. Lloyd K. Tilgham, Graydon M. Blackmon, Mrs. Gertrude Hudson Ellison, Mrs. Lessie Hudson Smith, May I. Hudson Thompson, Mrs. Grace Hudson Hyde, Mrs. Exie Hudson, Philip L. Hudson, Charles A. Hudson, E. S. Blackmon, Mrs. May Hudson, Mrs. Ruby (R. 756) Mae Mitchell, and N. L. Hudson, who represent and warrant that they are the sole existing heirs at law of Noah L. Hudson and Mrs. Mary E. Hudson, both deceased, late of Jasper County, Mississippi; and L. F. Easterling and L. C. Franklin, hereinafter called "Lessor" (whether one or more) hereby grants to Gulf Refining Company, hereinafter called "Lessee", the exclusive right to explore the land hereinafter described for mineral indications, to drill and mine thereon for oil, gas, sulphur and other minerals,

and to produce and appropriate any or all of same therefrom; the right to use, free of charge, oil, gas and water from the land in conducting operations thereon and in treating to make marketable the products therefrom; the right to construct and use on said land telephone, telegraph and pipe lines and facilities for the transportation and storage of minerals produced therefrom, as well as salt water; the right to construct and use such canals and roads as are necessary for Lessee's operations hereunder; the right to remove from the land at any time any property placed by Lessee thereon, and all rights necessary to the full enjoyment of this lease; all, however, during the term and subject to the conditions hereinafter stated.

The said land is situated in First District of Jasper County, Mississippi, and is particularly described as follows, to-wit:

East half of Southeast quarter (E½ of SE¼), Section 19; Southwest quarter of Southwest quarter (SW¼ of SW¼), Section 20; Northwest quarter (NW¼), of Section 29; Southeast quarter of Northeast quarter (SE¼ of NE¼), of Section 30; all in Township one (1), North, of (R. 757) Range Thirteen (13) East, comprising 320 acres.

For the purpose of calculating the payments hereinafter provided for, the superficial area of the land covered by the above description is estimated to comprise 320 acres.

1. This lease is effective as of the date January 1, 1940, and shall expire January 1, 1955 (hereinafter called "primary term") unless oil, gas or other mineral is being

produced in commercial quantities or operations for drilling or production are being conducted on or from the above described land or any portion thereof on said expiration date of January 1, 1955, and shall continue in effect so long thereafter as such production is being had or operations for drilling or production is being conducted in accordance herewith.

2. Lessee may at any time execute and deliver to Lessor or to the depository hereinafter named, or place of record, a release or releases covering any portions of the land and thereby surrender this lease as to such portion or portions and be relieved of all obligations as to the land surrendered. Any notice, release, or communication to Lessor may be given to Lessor personally, or by letter addressed to Lessor, care of Lamar F. Easterling, 1406 Deposit Guaranty Bank Building, Jackson, Mississippi. The Deposit Guaranty Bank & Trust Company of Jackson, Mississippi, is named as depository hereunder.

3. If prior to the discovery of oil on the land and at a time when Lessee is not actually engaged in drilling operations on the land, a well producing as much as two hundred (200) barrels of oil per day for thirty (30) consecutive days is brought in on (R. 758) adjoining land and within two hundred (200) feet of any outside boundary of the land then held hereunder, Lessee shall, within a reasonable time, begin, and with reasonable diligence, prosecute the drilling of a well on the land then held hereunder in an honest effort to discover oil in paying quantities.

4. After beginning operations on the land, and prior to discovering any mineral in paying quantities thereon, Lessee may maintain Lessee's rights in effect for so long as it pleases, even beyond the primary term, by continuing such operations without lapse of more than sixty (60) days between cessation of operations on one well and the beginning of operations for drilling another.

5. After discovery of any mineral in paying quantities on the land, all of Lessee's rights shall remain in effect so long as any mineral is produced in paying quantities from the land; and if such production should thereafter cease for any cause after the expiration of the primary term, Lessee may maintain all rights hereunder by beginning re-working operations or additional drilling within sixty (60) days after such cessation.

6. After the discovery of any mineral in paying quantities, Lessee shall be exempt from loss or forfeiture of this lease in whole or in part, except after final judicial ascertainment that Lessee has failed to perform its duty hereunder, and thereafter Lessee shall have a reasonable opportunity to perform and prevent such loss or forfeiture, and in event of final loss or forfeiture, there shall be reserved to Lessee all producing and drilling wells with forty (40) acres surrounding each well to be designated by Lessee.

(R. 759.) 7. Subject to and contingent upon the provisions of paragraph 14 hereof, Lessor shall be entitled to the following royalties; one-eighth (1/8) of the oil produced and saved and not used for fuel in conducting

operations on the land or in treating to make marketable the products therefrom; one-eighth (1/8) of any waste oil from the land or coming on to the land from other sources, if utilized; on gas, including casinghead gas or other gaseous substance, produced from said land and sold for purposes other than the manufacture of gasoline, the market value at the well of one-eighth (1/8) of the gas so sold. If such gas is sold for the manufacture of gasoline therefrom, the royalty shall be one-eighth (1/8) of the amount realized from such sale. In the event said gas is used off the lease or in the manufacture of gasoline therefrom by Lessee, the royalty shall be one-eighth (1/8) of the market value of such gas at the well. The royalty for each well producing gas only shall be Two Hundred and No/100 Dollars ($200.00) each year until such time as the gas from such gas well shall be utilized in the manufacture of gasoline or sold off the land; on sulphur fifty cents (50¢) for each long ton marketed; on salt three cents (3¢) for each long ton marketed; and a reasonable royalty on any other mineral produced in quantities deemed by Lessee to be paying. These royalties are based upon the ownership of the entirety of the mineral rights by Lessor. If, in any event or at any time, Lessor owns less than such entirety of the mineral rights in any portion of the land from which any mineral may be produced, such royalties shall be paid only in the proportion that Lessor's interest in the mineral rights in such portion bears to (R. 760) the entirety of the mineral rights therein.

8. The oil royalty shall be delivered to Lessor at Lessor's option into storage tanks provided by Lessor at

Lessor's expense on the land retained, or into any pipe line connected with the well; if Lessee provides such pipe line, Lessee may purchase such royalty oil at its posted market price for oil of like kind and quality from the same field; if no storage tanks are provided by Lessor and there is no pipe line connected with the well, Lessee shall have the optional right to purchase the royalty oil and to account to Lessor at the market price at the well.

9. Lessee shall bury its pipe lines below plow depth when requested by Lessor. No well shall be drilled nearer than two hundred (200) feet to the house or barn on said land without the written consent of Lessor, and Lessee shall be responsible for all damages caused by Lessee's operations other than damages necessarily caused by the exercise of the rights herein granted.

10. If the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is hereby expressly allowed, the covenants hereof shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or the minerals in and under the same or assignment of rentals or royalties shall be binding on Lessee unless Lessee shall have been furnished thirty (30) days before payment hereunder of such royalties with certified copies of recorded instruments showing the muniments of title. If six or more parties become entitled to royalties hereunder, Lessee may withhold payments thereof unless and until furnished with a recordable instrument (R. 761) executed by all of such parties designating an agent to receive payment for all.

11. If by reason of labor troubles at manufacturing plants, or as the result of exercise of rights by governmental authority, Lessee is delayed or hindered in obtaining material or equipment necessary in drilling or completing a well, or if as a result of war, flood, storm, fire, blowout, differences with workmen, requisition or order of governmental authority, Lessee is prevented from commencing or completing the drilling of any well or wells, then in any such event Lessee shall be relieved during the period of such delay or the continuance of such preventing cause from all obligations, whether express or implied, in this lease contained to commence or complete the drilling of any well or wells; and Lessee shall not be liable to Lessor in damages for failure to drill any such well during the time Lessee is relieved from the obligation so to do provided, this paragraph shall not have the effect of altering the condition under which this lease will remain in force beyond its primary term, unless at the time of expiration of the primary term Lessee is prohibited from drilling upon the leased premises by governmental orders in which event the primary term shall be extended automatically from year to year until the first anniversary hereof occurring 90 or more days following the cancellation of such governmental order; but inability to commence operations for drilling, and to drill, a well shall not relieve Lessee from the requirement of paying rentals if Lessee desires to continue this lease in force during any extension of the primary term, in absence of production, drilling and reworking operations, said rentals, for the purpose of this clause, after (R. 762) January 1, 1955, being fixed at the rate of One ($1.00) Dollar per acre per year, when lawfully demandable. In determining

whether Lessee has used reasonable diligence wherever required by any obligation of this lease, express or implied, the causes of delay in this paragraph set forth shall not be exclusive of any other cause or causes which may exist. If for any period or periods of time after oil or gas has been discovered on the leased premises same is not produced because Lessee is unable to obtain and install by reason of any cause set forth herein, any equipment or material necessary for handling or transporting such production, then nevertheless during such period or periods of time it shall be considered for the purpose of continuing this lease in effect under the terms hereof that production of oil or gas is being had upon the leased premises.

12. Lessee is hereby given the right to pool or combine the acreage covered by this lease or any parts thereof with other land, lease or leases in the immediate vicinity thereof, when in Lessee's judgment it is necessary or advisable to do so in order to promote the conservation of oil, gas or other minerals, such pooling to conform to drilling units prescribed by any applicable order of any governmental authority having jurisdiction of the subject matter, if such order be issued. Lessee shall record in the appropriate Records of the County in which the leased premises are situated, an instrument describing the pooled acreage. Operations for drilling or production on any part of a drilling unit composed in whole or in part of the land above described shall be considered as operations for drilling or production on land covered by this lease and the entire acreage constituting such (R. 763) unit or units shall be treated for all purposes as if the same

were included in this lease, except that in lieu of the royalties elsewhere herein specified Lessor shall receive on production from each of such units that proportion of the royalties herein stipulated that the amount of his ownership in the mineral rights in the acreage placed in the particular unit involved bears to the entirety of the mineral rights in such unit.

13. Lessor only warrants specially and shall not be obligated to refund the bonus received or any part thereof unless and except there be a breach of the special warranty occurring by claims of persons claiming by, through, or under the Lessor herein. In the event Lessor's title is disputed by suit or otherwise, Lessee shall have the right to withhold the payment of royalties provided for hereunder until the final determination of any such suit or dispute favorable to Lessor and shall have the right in such event to maintain this contract in force by giving notice to Lessor, or to the depository hereinabove named, of its intention to withhold such royalties. Lessee shall have the right to acquire or lease the interest of any party in said land and minerals which any such party claims is not covered by this instrument.

14. It is understood and agreed notwithstanding any provision of this instrument apparently to the contrary that Lessee does not in any way admit that Lessors, or any of them, have any right, title or interest in or to the lands, or any of them, covered hereby, or to any of the oil, gas and other minerals in and under or that may be produced therefrom, (unless and until Lessor establishes some title to or interest therein either by compromise

settlement or final decree in the suit entitled N. L. Hudson (R. 764) et al, Complainants, vs. The Gulf Refining Company et al, defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi), but on the contrary Lessee claims and asserts that it has good and valid title to all of the oil, gas and other minerals in and under and that may be produced from the land described in this lease by virtue of oil, gas and mineral leases theretofore executed by T. D. Lewis and Annie Lewis, recorded in Oil Lease Book 2, page 39; by Jettie Windham, G. R. Windham, Carrie Husband and Norman Husband, recorded in Oil Lease Book 2, page 251; by Margiree Jones and Abb Jones, recorded in Oil and Gas Book 2, page 213, and by Mason Newell, recorded in Oil and Gas Book 6, pages 547-548, all references are to the records of the First Judicial District of Jasper County, Mississippi.

It is further expressly agreed that Lessee has accepted and does accept this lease from Lessor not in recognition of the title or claim asserted by Lessor, but it has accepted and does accept this lease solely for the purpose of buying its protection to the title or titles to the land covered hereby, together with all the oil, gas and other minerals thereunder, or that may be or have been produced from said land under the terms of the hereinabove mentioned leases; and Lessee shall never be called upon to recede from its position that it now has and owns valid mineral leases covering all of said lands; and it shall be just as free hereafter as it has been heretofore to assert that its Lessors named in this paragraph have and had good and valid titles to the whole of the lands covered

hereby and to all of the oil, gas and other minerals thereunder at the respective dates of execution of said leases; and it is further agreed that the continued assertion of such contention by Lessee (R. 765) shall in no manner be deemed or construed a repudiation of the terms of this lease.

And, further, notwithstanding any provisions of this lease, apparently to the contrary, it is agreed and understood that Lessor shall not be entitled to and Lessee shall be under no obligation to pay Lessor any of the royalties, or any part thereof, provided for herein unless and until in the suit entitled N. L. Hudson, et al, complainants, vs. The Gulf Refining Company, et al, defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi, lessor shall have established by a compromise settlement between the parties thereto, or by final decree of the court therein, that the Lessor herein is the owner of the lands and minerals hereby leased and involved in said suit or the owner of an interest therein.

15. Lessee shall have the right at any time to discharge in whole or in part any tax, mortgage or other lien upon said land or mineral rights therein, including redemption from tax sale or adjudication and be subrogated to the rights of the holders thereof, and thereafter Lessee shall have the right to retain all rentals and royalties provided for hereunder, or any portion or portions thereof, and apply same towards reimbursements of Lessee for such payment upon giving notice of its intention to so apply such payments to Lessor or to depository named herein.

Lessor acknowledges receipt of Ten ($10.00) Dollars and other considerations, paid by Gulf Refining Company, as the full and adequate consideration for every right granted herein. The property above described is not homestead of Lessor.

(R. 766.) Thus Done, Read and Signed on this the 15 day of Dec., 1944.

(Signed)	MRS. LLOYD K. TILGHMAN,
	By PHILIP L. HUDSON,
	Atty. in fact.
(Typed)	MRS. LLOYD K. TILGHAM,
(Signed)	GRAYDON M. BLACKMON,
(Typed)	GRAYDON M. BLACKMON,
(Signed)	PHILIP L. HUDSON,
(Typed)	PHILIP L. HUDSON
(Signed)	CHARLES A. HUDSON,
(Typed)	CHARLES A. HUDSON,
(Signed)	MRS. MAY HUDSON,
(Typed)	MRS. MAE HUDSON,
	(Mrs. Mae Hudson as typed has been changed to Mrs. May Hudson. The margin of the instrument is here initialed E. Q. H.)
(Signed)	MRS. RUBY MAE MITCHELL,
(Typed)	MRS. RUBY MAE MITCHELL,
(Signed)	N. L. HUDSON,
(Typed)	N. L. HUDSON,
(Signed)	L. F. EASTERLING,
(Typed)	L. F. EASTERLING,

(Signed) L. C. FRANKLIN,
(Typed) L. C. FRANKLIN,
(Signed) GRACE HUDSON HYDE,
(Typed) MRS. GRACE HUDSON HYDE,
(Signed) By E. Q. HYDE,
Attorney-in-fact,
(Signed) By CHARLES A. HUDSON,
Attorney-in-fact,
(Signed) By N. L. HUDSON,
Attorney-in-fact,
(Signed) E. S. BLACKMON,
(Typed) E. S. BLACKMON,
(Signed) By E. Q. HYDE,
Attorney-in-fact,
(Signed) By CHARLES A. HUDSON,
Attorney-in-fact,
(Signed) By N. L. HUDSON,
Attorney-in-fact,
(R. 767) (Signed) GERTRUDE HUDSON
ELLISON,
(Typed) MRS. GERTRUDE HUDSON
ELLISON,
(Signed) By E. Q. HYDE,
Attorney-in-fact,
(Signed) By (C. A. HUDSON),
CHARLES A. HUDSON,
Attorney-in-fact,
(Signed) By N. L. HUDSON,
Attorney-in-fact,
(Signed) MRS. LESSIE HUDSON SMITH,
(Typed) MRS. LESSIE HUDSON SMITH,

(Signed) By E. Q. HYDE,
Attorney-in-fact,
(Signed) By CHARLES A. HUDSON,
Attorney-in-fact,
(Signed) By N. L. HUDSON,
Attorney-in-fact,
(Signed) MAY I. HUDSON THOMPSON,
(Typed) MAY I. HUDSON THOMPSON,
(Signed) By E. Q. HYDE,
Attorney-in-fact,
(Signed) By CHARLES A. HUDSON,
Attorney-in-fact,
(Signed) By N. L. HUDSON,
Attorney-in-fact,
(Signed) MRS. EXIE HUDSON,
(Typed) MRS. EXIE HUDSON,
(Signed) By E. Q. HYDE,
Attorney-in-fact,
(Signed) By CHARLES A. HUDSON,
Attorney-in-fact,
(Signed) By N. L. HUDSON,
Attorney-in-fact.

(Acknowledgments omitted.)

(R. 773.) By Mr. Buchanan:

We offer deed book 20, page 391, et seq., showing protective lease from N. L. Hudson, et al to Tidewater Associated Oil Company, dated June 5, 1945, said instrument being in words and figures as follows:

(Exhibit omitted.)

(R. 785.) By Mr. Cameron:

Complainants object to the introduction of these leases in evidence; they are *res inter alios acta,* and generally incompetent, irrelevant and immaterial.

By the Court:

Overruled.

GARNER W. GREEN, called as a witness, for and on behalf of defendants, being duly sworn, testified as follows, to-wit:

Direct Examination.

By Mr. Stevens:

Q. Please state whether or not any of the royalties have been paid under the leases executed to Gulf Refining Company?

A. No, sir.

Q. Has Gulf paid royalty on any of this land involved in this suit?

A. No, sir, according to my information.

Q. The reason it has not been done is because of this litigation?

By Mr. Cameron:

We object to that.

By the Court:

Overruled, if you are familiar with the facts.

A. Where a title is in controversy royalty is not paid, especially where there is a law suit.

(R. 786.) By the Court:

Is there any other controversy except this one?

A. I can't answer, I have not examined the records, but I do know about this one.

By Mr. Buchanan:

That is all.

Cross Examination.

By Mr. Cameron:

Q. Mr. Green, it is a fact if the Gulf Refining Company has notice from any source that a title is questioned it does withhold payment of royalty, whether there be a suit or any other question?

A. Mr. Cameron, that lies without my power. I say normally that would be a question that would be left to the general counsel, his opinion would control. As a general policy I would say that is correct.

Q. As I understand then royalties are payable if oil is taken out of the land involved in this litigation, but that the money is being held by the Gulf Refining Company, is it?

A. Yes.

Q. There has been offered in evidence over complainants objections lease given by the Hudsons, the complainants in this case, to Gulf Refining Company. The consideration for that lease was paid by the Gulf Refining Company, was it not?

A. Yes, sir.

Q. And that consideration was $50,000.00 cash?
A. In the form of a draft.

(R. 787.) By Mr. Cameron:
That is all.

Re-Direct Examination.

By Mr. Stevens:
Q. Is it your understanding these royalties have not been paid the Lewis family and other owners of the land is because of the pendency of this law suit?
A. So far as I know it is. There may be other facts but so far as I know, I don't know it.
Q. You do know that this litigation was referred to in the protective lease?
A. Yes.

By Mr. Cameron:
We object; the lease speaks for itself.

By the Court:
Sustained.

By Mr. Stevens:
Q. You are of counsel for Gulf Refining Company?
A. In certain cases.
Q. Are you leading counsel for Gulf Refining Company in this litigation?
A. I am of counsel for Gulf Refining Company, but associated with other counsel with certain authority.

By the Court:

Q. Mr. Green, has Gulf Refining Company deposited any money in this Court?

A. No, sir, the lease does not require that they deposit money.

(Witness excused.)

(R. 788.) WILLIAM LEWIS, called as a witness, for and on behalf of defendants, being duly sworn, testified as follows, to-wit:

Direct Examination.

By Mr. Stevens:

Q. Your name is William Lewis?

A. Yes.

Q. You are a son of Talmage D. Lewis?

A. Yes, sir.

Q. Are you directly interested in the land involved in this litigation?

A. Yes.

Q. You have an interest in the royalties?

A. Yes.

Q. State whether or not Gulf Refining Company has paid any royalties for the lease they hold?

A. No.

Q. None of it at all?

A. No.

Q. What about Tidewater Associated Oil Company?

A. They have not paid anything.

Q. So the royalties provided in the mineral lease are being accumulated, not paid to any of you folks?

A. That is right.

Q. Why is it not paid, Mr. Lewis?

By Mr. Cameron

We object.

(R. 789.) By the Court:

Overruled.

By Mr. Stevens:

Q. What reason did they assign?

A. Well, this law suit, they would not do anything until this law suit was settled.

Q. Until the law suit was settled?

A. Yes, sir.

Cross Examination.

By Mr. Cameron:

We move to exclude the answer as incompetent, irrelevant and immaterial.

By the Court:

Overruled.

By Mr. Cameron:

No questions.

(Witness excused.)

By Mr. Buchanan:

We offer a decree of the Court of March 15 on the motion to examine certain documents and to secure certain correspondence, and certain proof of possession, certain proof of heirship that the defendants had prepared for the defense of the said motion.

By Mr. Cameron:

We have no objections.

(R. 790.) By Mr. Buchanan:

It is a part of the record any way.

Defendants Rest.

Defendants having rested whereupon Complainants in support of their motion to dismiss offered and introduced the following:

(R. 791.) By Mr. Cameron:

May we agree that the documents submitted in favor of complainants, and the decree just introduced in evidence, are all matters of record in the office of the Chancery Clerk of Jasper County, Mississippi?

By Mr. Buchanan:

Yes.

By Mr. Cameron:

We offer in evidence a letter from Wilbourn, Miller and Wilbourn to W. S. Welch, dated January 5, 1945,

and ask that same be identified as Exhibit 1 to Complainants' testimony.

(Exhibit omitted.)

(R. 794) By Mr. Cameron:

We offer in evidence, if the Court please, copies of the complaints filed by the complainants, N. L. Hudson, et al, as follows:

N. L. Hudson, et al versus Mason Newell, et al, number 270, in the District Court of the United States for the Eastern Division of the Southern District of Mississippi;

N. L. Hudson, et al versus T. D. Lewis, et al, number 271;

N. L. Hudson, et al versus Jettie Kelly Windham, et al, number 272;

N. L. Hudson, et al versus Margiree Jones, et al, number 278, and ask to have them identified as Exhibits 2, 3, 4 and 5 to complainants testimony. Exhibits omitted.)

(R. 850) By Mr. Cameron:

That is all.

Complainants Rest.

(R. 851) By the Court:

Gentlemen, after listening to all of the argument my mind is not free from doubt. I would like to make a little independent investigation myself.

I will give an opinion and a decree next week sometime.

(R. 721) DECREE OVERRULING MOTION TO DISMISS.

This cause having been heard at the regular January 1946 term, and having been submitted to be decided in vacation, on motion of complainants for leave to dismiss their bills without prejudice, after due consideration it is ordered and decreed that said motion be and the same is hereby denied and overruled.

Ordered this January 18, 1946.

(S.) GEO. B. NEVILLE,
Chancellor.

Filed Jan. 21st, 1946. J. J. Denson, Clerk, by Birdie D. Brame, D. C. E. M. B. #3, Page 197.

* * * * * *

(R. 730.) In Re: N. L. Hudson, et al,
vs.
Gulf Refining Co., et al. #398.

First District, Jasper County.

Gentlemen:

I have called a special term of the Chancery Court of the First District of Jasper County beginning the first Monday in May. The above case will be triable at that term.

It has come to my knowledge that certain parties interested in the case have made threats against certain litigants, witnesses and attorneys. Of course, I have no personal knowledge that any such threats have been made.

But it is my duty, as I see it, to see that all officers of the court, litigants and witnesses are protected.

Section 4240 of the Code of 1942 requires the Sheriff to attend all sessions of the court "with a sufficient number of deputies or bailiffs". I am directing the Sheriff to appoint 12 deputies from the western part of Jasper County, men of character and courage, to attend the special term of court, and it is my purpose to require the Sheriff and his deputies to search every person who comes in the court room. I want every one who is connected with this case to understand that it is my purpose to see that they are protected while attending court.

I am writing you confidentially for the reason that I do not care that any notice be given of this action to the public.

(R. 731.) If you have any suggestions to make I will be glad to hear from you.

With regards and best wishes, I am,

Your friend,

(S.) GEO. B. NEVILLE,

(T.) GEO. B. NEVILLE,

Chancellor.

Filed May 6, 1946. J. J. Denson, Clerk.

* * * * * *

(R. 724.) Come the complainants, and, insisting that this Court is without jurisdiction to proceed further in this

case, and not entering their appearance except to file this protest in response to the letter of the Judge of this Court, nevertheless, having through their attorneys received a letter written by Honorable George B. Neville, Chancellor, stating that he had called a special term of this Honorable Court, and stating further that this case will be triable at that term (a photostatic copy of which letter is attached as a part hereof), they file this their protest upon the convening of said term and object to a trial being had, or any other proceedings or action taken, at said special term of court, and say:

I.

They voluntarily entered this Honorable Court and filed their bill of complaint, and submitted the issues set forth in their pleadings to this Honorable Court, and pursued said case at great expense to themselves, all in good faith; and that no process of any kind has ever been served on them in this case, and no relief has ever been asked against them, and no possession has ever been taken of any land or any moneys, or any matter or thing involved in this suit, and that the only jurisdiction this court has ever had was conferred on it by the voluntary acts of the plaintiff in filing (R. 725) this suit and pursuing it as reflected by the record in the case.

II.

On December 12, 1945, pursuant to the right given them by the Constitution, statutes and laws of the State of Mississippi, and the Constitution, statutes and laws of the

United States, they filed their motion to dismiss this case without prejudice, and thereby withdrew their appearance in this court and withdrew from this Honorable Court any jurisdiction it ever had to proceed herein, except to enter an order dismissing the same without prejudice as prayed by the complainants. Notwithstanding the absolute right of the complainants to dismiss without prejudice the case brought by them, this Honorable Court entered upon a hearing of said motion to dismiss, and, on January 14, 1946, entered its order taking said motion under advisement for decree in vacation, which order is entered in Minute Book 3, page 177, of the minutes of this court; and after the adjournment of the January 1946 term of this court, by decree dated January 17, 1946 and recorded on said minutes in Minute Book 3, page 196, entered its order in vacation, dated January 18, 1946, which order is recorded in Minute Book 3, page 197, of said minutes, overruling complainants' motion to dismiss without prejudice, which orders are referred to and made a part hereof.

Before the entry of any of said orders, this Honorable Court was advised that complainants had, on December 11, 1945, filed four actions in the District Court of the United States for the Eastern Division of the Southern District of Mississippi, embracing the same issues and subject matter as those involved in this suit, and copies of the complaints in said actions were exhibited to this Honorable Court, said actions so brought in said District Court of the United States being styled as follows:

Civil Action File #270—N. L. Hudson, et al v. Mason Newell,

Civil Action File #271—N. L. Hudson, et al v. T. D. Lewis,

Civil Action File #272—N. L. Hudson, et al v. Jettie K. Windham, et al,

Civil Action File #278—N. L. Hudson, et al v. Margiree Jones, et al.

(R. 726) III.

(a) Before the entry of said orders above mentioned by this Honorable Court, the defendants in said four civil actions in said Federal Court had filed their motions to dismiss said actions, and each of them, because of want of jurisdiction, and to dismiss or abate the same because of the pendency of this suit, and to dismiss because of want of indispensable parties or of the jurisdictional amount, and for other causes, and had also filed motions to arrest the taking of depositions in said actions by these complainants as plaintiffs therein.

(b) Thereafter plaintiffs filed their second and third counts in each of said four actions in the United States District Court, and defendants therein filed their supplemental motions to dismiss and to abate said second and third counts, and all of said motions were submitted to the said United States District Court, and the parties engaged in extended argument, and the said District Court of the United States entered its order in each of said cases overruling all of the motions of the defendants and entered its Findings of Fact and Conclusions of Law in

each of said cases. Plaintiffs file, as exhibits hereto, copies of the second and third counts and order allowing same, the order entered by the court and Findings of Fact and Conclusions of Law on all of the said motions of the defendants, all duly certified as such proceedings were had in Case No. 271, styled "N. L. Hudson et al, v. T. D. Lewis, et al". Identical action was taken in each of the other cases, and the pleadings filed were substantially identical, and complainants now file said pleadings in only one of said actions for the sake of brevity and to avoid unnecessary prolixity and costs.

(c) Defendants in said four civil actions in the United States District Court have, since the overruling of the said motions, filed their answers, aggregating more than 100 pages, and all of said actions are at issue.

(R. 727.) (d) Plaintiffs have, since the overruling of the motion of defendants seeking to arrest the taking of depositions, proceeded with the taking of depositions, and have taken several depositions and are pressing said actions for trial, and proceeding with full diligence towards getting said actions to trial at the first possible moment.

(e) Defendant, Gulf Refining Company, which has taken the lead for the defendants in said four actions in the United States District Court, has filed interrogatories to the plaintiffs aggregating more than 400 pages of typewritten matter; and the parties to said actions are making ready to try the same in the said United States District Court, and said actions will come on for trial within a

reasonable time, and will be disposed of by said United States District Court which has assumed full jurisdiction thereof, and which is fully prepared to go forward with and decide all of the issues involved in said actions, being the same issues as those involved in this case.

IV.

(a) The above mentioned civil actions in the United States District Court are brought on the ground of diversity of citizenship between complainants herein and the defendants named in said civil actions; and jurisdiction of such proceedings is conferred upon the United States District Court by Art. III, Sec. 2, of the Constitution of the United States and by Sec. 24 of the Judicial Code (28 US Code Annotated 41(1)); and the jurisdiction of the said United States District Court to hear and determine the controversy between the complainants herein and the defendants in said civil actions is not affected by any act or thing done or performed in this court; so that, as to the controversies existing between said complainants and said defendants, any proceedings had herein will be *moot* and without force and effect. In addition to the other matters herein mentioned, in order for complainants to appear and prosecute this suit (R. 728) in this court, complainants would be put to great expense, trouble, harrassment and delay, and to no avail and without any just reason, cause or excuse.

(b) Said District Court of the United States is, as aforesaid, proceeding with the trial of said issues, and is ready and able to proceed with such trial free of any

atmosphere of threats or intimidation or oppression, and under such circumstances that the witnesses and all who engage in the trial may perform their respective parts without fear of violence, and without intimidation or oppression.

(c) Plaintiffs are non-residents of the State of Mississippi and have the right guaranteed by the Constitution and Laws of the United States to have their persons and valuable property rights protected by the courts of the United States.

V.

If this court should fail to recognize and give effect to the absolute right of the complainants herein to dismiss their case without prejudice and to submit their rights to the United States Courts, or should attempt to take any action or proceedings or enter any decree at this term of court, or should attempt to require these complainants to go to trial in the cause or to proceed further therein, all such attempted action would be to deny to the complainants rights vouchsafed them by the Constitution and Laws of the United States and rights conferred upon them by Sec. 24 of the United States Judicial Code and Art. III, Sec. 2, of the Constitution, and would be to deprive them of their property without due process of law, and to deny to them the equal protection of the laws, as guaranteed by Art. XIV of the Constitution, and would be an illegal and unwarranted divesting of the jurisdiction of the District Court of the United States, aforesaid, the benefit and protection of all of which constitution and laws and

jurisdiction of the United States and its courts is specifically claimed by the complainants.

(R. 729.) Wherefore, complainants, and each of them, object to any action being taken herein by this Honorable Court, except to recognize and give effect to the dismissal without prejudice of this suit by the complainants.

LAMAR F. EASTERING,
LESTER C. FRANKLIN,
GEORGE E. SHAW,
CAMERON & WILLS,
Solicitors for Complainants,

(S.) By BEN F. CAMERON.

State of Mississippi,
County of Jasper.

Personally appeared before me, the undersigned Clerk of the Chancery Court of the First District of Jasper County, Mississippi, Lester C. Franklin, who makes affidavit that he is attorney of record for complainants and agent of complainants with authority to make this affidavit, and that the matters and things set forth in the foregoing document as of his own knowledge are true as therein stated, and those set forth on information and belief are set forth on information which he verily believes to be true.

(S.) LESTER C. FRANKLIN.

Sworn to and subscribed before me by the said Lester C. Franklin this 6th day of May, 1946.

(S.) J. J. DENSON,
Chancery Clerk.

* * * * * * *

(R. 856.) By the Court:

Complainants have filed an exception, or motion.

By Mr. Stevens:

We are looking at the motion; we would like to have time to read it.

By the Court:

All right; read the motion.

By Mr. Wills:

It is not a motion, it is an objection to proceeding in the case. Our sole purpose is to present this objection to Your Honor.

(Document read to the Court.)

By the Court:

Is it your contention that this Court is without full power to try the issue?

By Mr. Wills:

It is our contention when our motion was made to dismiss this Court was divested of jurisdiction. This objection is interposed to re-affirm that position, make clear to Your Honor what the purpose is.

By Mr. Stevens:

It is interpreted as a suggestion of error.

By Mr. Wills:

It is a written document and speaks for itself.

By the Court:

Anything else?

By Mr. Green:

On behalf of Gulf Refining Company we have in this (R. 857) original suit interposed a cross bill. We want to be perfectly fair and frank about this. We thought and still think that the exclusive jurisdiction to adjudicate this case is vested in this Court. We are ready so far as the Gulf Refining Company is concerned to go on with this case and have it determined.

By the Court:

Anything else?

By Mr. Stevens:

Unless the Court wants to ask some questions.

By Mr. Buchanan:

We take the same position, that this Court has concurrent jurisdiction, if not exclusive jurisdiction. We wish the Court to proceed with the trial of the case.

By Mr. Wells:

We think this Court has exclusive jurisdiction, and so far as the Tidewater Associated Oil Company, it is ready to go forward.

By Mr. Scott:

As to the defendants I represent in this case, we are ready and ask the Court to proceed with the trial of the case.

By Mr. Stevens:

On behalf of the Lewis family I want to make clear all these proceedings in the Federal Court were against our protest.

We think this Court has exclusive jurisdiction. It is a suit involving property rights, seeking to remove clouds and confirm title, adjudicate between owners their respective claims to this land or property. The venue is in this county, Jasper (R. 858) County.

So far as I know this case involves more property rights than any suit adjudicated by Your Honor, or anybody has adjudicated in the State. The issue should be put at rest by adjudication in this court.

We do not concede and have not conceded the Federal Court has any jurisdiction. Anything done in the Federal Court is void and should be held void in my humble judgment notwithstanding the ruling.

By Mr. Pack:

The defendant, Mrs. Mamie M. Abney, submits that this Court has exclusive jurisdiction, and further states that any and all actions, pleadings and proceedings by her in the Federal Court has been done in defense and express preservation of her rights; that this case should be litigated in this court.

By Mr. Wilbourn:

That is true of all defendants in each case in the Federal Court.

By Mr. Buchanan:

Yes. We still maintain the Federal Court has no jurisdiction.

By the Court:

I understand you all agree it is not necessary to enter any order on the allegations in the exceptions with reference to the threats, that this Court cannot protect its litigants and solicitors.

I will proceed with the trial of the case.

(R. 859.) By Mr. Wills:

Complainants are still standing on their objection and in doing so we beg leave to respectfully withdraw from the court room.

By the Court:

All right.

By Mr. Buchanan:

Before they withdraw I wish to say that we wish to put on our proof.

By the Court:

All right.

(Complainants' attorneys here withdrew from the court room, taking no further part in the trial of the case, whereupon Defendants offered and introduced the following: * * *

(R. 749-A) **FINAL DECREE.**

This cause coming on this day to be heard on original bill and amendments thereto, answers of all of the defendants thereto, and the cross-bill of Gulf Refining Company as against complainants as cross-defendants and the general demurrer of cross-defendants to said cross-bill, and proof, came the parties complainant by their attorneys and filed herein written objections to the jurisdiction of the court to try this case, but asked for no order to be entered thereon; and all the defendants announcing ready and demanding trial; and the Court being of the opinion that the court has jurisdiction to try this cause at this term, and there being no motion for or grounds for a continuance of the said cause, announced that the trial thereof should proceed;

Whereupon the attorneys for complainants announced to the Court that they would not proceed with or take part in any trial of the cause but would withdraw from the courtroom which they then and there did;

Thereupon the defendants offered evidence in open court to sustain their defenses to the original bill and amendments and evidence to sustain the allegations of the cross-bill of Gulf Refining Company; and the Court having heard and considered the pleadings, and the proof, doth now find, order, adjudge and decree from the pleadings and the competent proof as follows:

1.

That this Court has jurisdiction to adjudge and decree in the manner and form as it now does, and does not recog-

nize the right of complainants to withdraw as was wrongfully done, the Court (R. 749-B) reaffirming the Court's prior ruling refusing to allow a dismissal of said cause without prejudice by decree heretofore entered in said cause.

2.

That the complainants are not entitled to the relief prayed for nor to any relief and that the original bill and all amendments thereto be and they are hereby dismissed with prejudice.

3.

That the demurrer of complainants and cross-defendants to the cross-bill of Gulf Refining Company be and it is hereby overruled.

4.

That the Gulf Refining Company as cross-complainant is entitled to the relief prayed for in its cross-bill against complainants and cross-defendants and that the leases possessed by the Gulf Refining Company as listed in its original answer and cross-bill and recorded as follows, to-wit:

(1) Jettie Windham, G. R. Windham, Carrie Husband, and Norman Husband to Gulf Refining Company, recorded in Oil & Gas Record Book 2, at page 251, of the records of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi.

(2) Margiree Jones and Abb Jones to Gulf Refining Company, recorded in Oil & Gas Record Book 2, at page 213, of the records of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi.

(3) Mason Newell to Gulf Refining Company, recorded in Oil & Gas Record Book 6, at page 547, of the records of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi.

(4) T. D. Lewis and Annie Lewis to Gulf Refining Company, recorded in Oil & Gas Record Book 2, at page 219, of the Chancery Clerk of the First Judicial District of Jasper County, Mississippi; and amendment thereto recorded in Oil & Gas Book 9, at page 341 of said records. (R. 749-C.)

are hereby adjudged and decreed to be good and valid; and that all claims of title, right or interest on the part of the complainants and cross-defendants and each of them in and to any or all of the lands covered by said leases are hereby canceled, annulled, and for naught held, and adjudged to be without foundation in fact or in law, and that the cross-complainant Gulf Refining Company is not due complainants and cross-defendants any royalty or royalties whatsoever.

5.

That no final record herein shall be made except that this decree shall be entered on the final record book and recorded as deeds are required to be recorded.

6.

That complainants and cross-defendants pay all costs herein to be taxed and that decree therefor is hereby entered against all such complainants and cross-defendants and the sureties on their bond for costs filed heretofore in this cause, for all of which execution may issue.

Ordered, adjudged and decreed in open court this the 6th day of May, 1946.

GEO. B. NEVILLE,
Chancellor.

* * * * * *

ASSIGNMENT OF ERRORS. No. 36,406.

(R. 145.) Come the Appellants, N. L. Hudson, Mrs. Exie Hudson, Philip L. Hudson, Mrs. Mary Lee Tillman, Mrs. Lessie Hudson Smith, Charles A. Hudson, Mrs. Mae Hudson Thompson, E. S. Blackmon, Graydon Blackmon, Mrs. Mae Hudson, Mrs. Ruby May Mitchell, through her uncle and next friend N. L. Hudson, Mrs. Grace Hudson Hyde, Mrs. Gertrude Hudson Ellison, being all of the complainants in the Court below, and assign the following errors of the Chancery Court of the First Judicial District of Jasper County, Mississippi, to-wit:

1. Said Court erred in overruling the Motion to Dismiss without Prejudice filed by complainants below (R. 605).

2. Said Court erred in entering its decree dated January 18, 1946, and recorded in Equity Minute Book 3, Page 197, of the records of said Court (R. 721).

3. The said Court erred in entering a final decree against complainants below, which decree is recorded in Deed Book No. 14, Pages 327-8, of the Land Records of Jasper County, Mississippi, and is dated May 6, 1946 (R. 749-A to 749-C).

4. Said Court erred in decreeing (R. 749-B) that complainants below did not have the right to dismiss their cause without prejudice.

5. Said Court erred in proceeding to a hearing and decree in said cause on May 6, 1946 (R. 749-A to 749-C, inclusive), said date not being a regular day of a regular or legal term of court in the First Judicial District of Jasper County, Mississippi.

6. Said Court was without jurisdiction to enter said decree at said time and place.

7. Said Court erred in declining to allow complainants below to dismiss their cause without prejudice, and in refusing to honor complainants' objection and in proceeding to a hearing in the absence of the complainants below and in hearing evidence and enterig a decree finding the facts and issues against complainants and dismissing their cause with prejudice.

8. Said cause was not triable at the time and place said final decree was attempted to be entered and the said Court erred in entering said final decree.

9. Said Court was advised that complainants, being non-residents of the State of Mississippi, had availed themselves of the rights given them by the Constitution and laws of the United States and had filed their actions in the United States District Court and that said District Court had overruled motions to dismiss and had taken jurisdiction of said actions and that same were being diligently prosecuted by complainants; and the Court below erred in refusing to honor the protest and objection filed by complainants (R. 725-49) and in refusing to recognize the jurisdiction of said United States District Court and in proceeding to hear evidence and enter its final decree against complainants.

In committing each and all of the errors complained of, as set forth in the record, said Court took action which amounts to and effects the taking of the property of appellants without due process of law and the denial to appellants of the equal protection of the laws in violation of the Constitution and laws of the United States and the Constitution and laws of the State of Mississippi.

Wherefore, appellants pray that the action and decrees of the Court below may be reversed, and that a decree may be entered by this Honorable Court dismissing the suit without prejudice; and that such other and further relief may be granted to appellants as will do full and general justice to them in the premises.

OPINION OF SUPREME COURT OF MISSISSIPPI.
(R. 454)

DIVISION B.

L. A. SMITH, SR., J.:

Thirteen heirs of N. L. Hudson, Sr., claiming to be the sole and only owners in fee of the 360 acres of land described, as well as of all the mineral interests therein, filed their bill in the Chancery Court of Jasper County against 106 defendants, including the Gulf Refining Company (which, under a mineral lease from certain of its co-defendants, had developed and was developing its holdings into an actual oil-producing acreage), and against other defendants, who, in addition to Gulf Refining Company, claim under other mineral leases covering in the aggregate all of the lands in question.

The claim of the said Hudson heirs is that during the year 1878 or 1879, N. L. Hudson, Sr., the then owner of the land, had conveyed all of it to his wife, M. E. Hudson, for the term of her natural life, and at her death to the children of said N. L. Hudson, Sr., for life, the remainder in fee to their children; that the deed was duly recorded, but the record thereof was destroyed by the courthouse fire in September 1932; and that complainants have not been able to find the original deed for recordation. It was further averred that N. L. Hudson, Sr., died in 1895, and M. E. Hudson, in 1928, and that subsequently to the date of the deed conveying a life estate to her, M. E. Hudson had executed deeds of conveyances to various grantees as if she owned the title to fee simple. Complainants, ap-

pellants here, also charged that by these conveyances the 106 defendants were, as latest grantees or their heirs, the present adverse claimants; and that by reason of the facts, *supra*, appellees had become and remain since the death of M. E. Hudson, the tenants at sufferance of the complainant heirs.

Nearly all of the numerous defendants answered, and Gulf Refining Company and some twenty-five other defendants made their answers cross-bills. The answers denied that Hudson had made any such deed to his wife in 1878 or 1879, or at any other time in any such terms as asserted by complainants. On the contrary, they averred that, in fact, Hudson had made to his wife, M. E. Hudson, on January 23, 1880, a deed to the lands in fee simple absolute, this deed being recorded in Book 20, p. 135 of the records of deeds of the county. The defendants, appellees here, averred also that by unbroken chains of title from M. E. Hudson to them, as well as by more than forty years of adverse possession, they have become the owners, and that the complainants never in fact owned any interest whatever in the lands.

The answer by Gulf Refining Company, in addition to elaborate denials and averments touching the title by executed conveyances, adequately alleged adverse possession in its predecessors in title for the long period of years aforesaid. Making its answer a cross-bill, it prayed that its mineral lease be confirmed as against the original complainants, and prayed for alternative as well as for general relief. The twenty-five other defendants who made their answers cross-bills, in addition to setting up their

particular interest in the premises, adopted all the denials and averments of the answer of the Gulf Refining Company and likewise, and as stated, made their answers cross-bills. The answer and cross-bill of Gulf Refining Company was filed on September 16, 1944, and those of the other twenty-five cross-complainants on September 30, 1944. On December 12, 1945, the complainants filed a motion to dismiss their original bill aforesaid without prejudice, which motion was actively resisted by numerous of the original defendants, and the motion was overruled.

Had there been no cross-bills, it may have been that the complainants would have had the right to dismiss, as they sought to do, but leaving that question aside for the moment, we are of the opinion that they had no right to do so and at the same time secure the dismissals of the cross-bills, unless by the consent, express or implied, of the cross-complainants.

In days gone by it was the general rule that the dismissal of the original bill carried with it the cross-bill, but the modern rule, and particularly in this State, is as stated in Griffith Miss. Chancery Practice, Section 384, which reads as follows:

> "The strict theory of the cross-bill is that it is a dependent of the original bill, in consequence of which formerly it was generally held that a dismissal of the original bill carried with it the cross-bill, but this rule too has been departed from so that now if the cross-bill seeks affirmative relief separately and independently of the original bill—although, of course, growing out of or touching the same subject matter

involved in the original bill, as it must—the court will at the insistence of the cross-complainants retain it and proceed with its issues, if the cross-bill and its facts be complete enough within themselves and without the aid of the original bill to make the granting of relief thereon practicable and proper. It is at last a matter within the sound discretion of the court to be wisely exercised towards the advancement of justice between the parties. And not only will the court retain the cross-bill in every case where if the matter had been brought in an original bill it would have retained it, but it should be kept in mind that the advancement of our procedure has developed a definite disfavor towards any practice which tends to turn parties out of court when once they were fairly in, and of sending them away either to transform the pleadings or else to begin the matter over again. Therefore, it is only when the matter of the cross-bill, independently considered, is so clearly of law as to be distinctly a better subject of determination at law, that a cross-bill will be dismissed, or transferred, merely because the original bill has been dismissed."

This statement is in accord with the weight of authority elsewhere, as may be found in 30 C. J. S., Equity, Sec. 388, pp. 804-806.

Thus it is seen that the cross-bill will be retained where, if the matter therein had been brought in an original bill, it would have been retained, and that in such case it is only when the matters of the cross-bill, independently considered, are so clearly of law as to be distinctly a better subject of determination at law, that a cross-bill will be dismissed merely because the original bill has been dis-

missed. In other words, where the relief sought by the cross-bill is a matter cognizable at law, dismissal of the original bill carries with it, generally, the cross-bill, and the cross complainant is relegated to his remedy at law. But here the prayer of the cross-bills sought confirmation of title to land, and hence was equitable, as pointed out further in the succeeding paragraph.

Here, the cross-bills bring forward, with elaboration, the issue of adverse possession, and rely thereon in addition to the title by conveyances, a feature in respect to which no substantial aid is furnished by the original bill, and as to Gulf Refining Company it prays that its title be confirmed in it as against all the original complainants. This right to have an affirmative adjudication in chancery of title to real estate is one conferred by statute, supplementary to the ancient rules in equity on that subject. It is not so clearly of law as to be distinctly a better subject of determination at law, the fact being that, at this day in this State, land-title questions are almost always presented in the chancery court, the action of ejectment having become nearly obsolete in actual practice, and certainly so in cases involving parties as numerous as in the instant case.

It is said, however, that as to Gulf Refining Company, the latter filed no objections to the motion to dismiss and thus did not insist that its cross-bill be retained, to which Gulf Refining Company replies, citing Griffith Chan. Prac., Sec. 407, that no formal objection or response to such a motion was required, and the burden of proof to support it was on the movant; and further that the record shows

that Gulf Refining Company, by its attorney, was present and participated in the hearing wherein the motion to dismiss was resisted.

We are of the opinion, therefore, that the court was correct in not dismissing the cross-bills, and in proceeding to a final hearing on them, without the attendance of cross-defendants, who purposely absented themselves; and, further, that upon the record the court was correct in sustaining the cross-bills on the merits.

This brings us back to the original bill—whether it should have been dismissed, retaining the cross-bills. This, as it seems to us, has now become, as to all practical purposes, a moot question. Under the cross-bills every issue and question, which could have been determined under the original bill, were adjudicated against the original complainants and cross-defendants in favor of cross-complainants and their privies. Thereby the whole matter has now become *res adjudicata*. *Van Zandt v. Town of Braxton*, 149 Miss. 461, 465, 115 So. 557; *Watkins v. State Board*, 170 Miss. 26, 32, 154 So. 277. 'Upon similar principles see also Griffith's Chan. Pract., Secs. 263, 363, 571, 624.

In view of the foregoing announcement of our conclusion here, which completely determines the ultimate solution of the problem on the appeal before us, we do not deem it necessary to discuss other points, on both sides, ably argued in the several briefs filed.

The decree of the Chancery Court will, therefore, be and is affirmed.

AFFIRMED.